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Ethics Commission



25 Van Ness Ave., Suite 220  
San Francisco, CA 94102  
Phone 252-3100 Fax 252-3112

**SAN FRANCISCO ETHICS COMMISSION  
NOTICE OF REGULAR MEETING**

**April 28, 2014, 5:30 P.M.**

**and AGENDA**

**Room 400 City Hall**

**1 Dr. Carlton B. Goodlett Place, San Francisco**

GOVERNMENT  
DOCUMENTS DEPT

APR 25 2014

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- I. Call to order and roll call.
- II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.
- III. Discussion and possible action on a matter submitted under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance.  
(Attachments: Memorandum to Commission, Hearing Notice, staff Report and Recommendation and Appendix A and Appendix B.)
- a) Ethics Complaint No. 03-140303, hearing regarding alleged willful violation of the Sunshine Ordinance by a department head (referred from the Sunshine Ordinance Task Force on March 3, 2014, Sunshine Ordinance Task Force complaint number 12058.)  
Complainant: Dominic Maionchi  
Respondent: Phil Ginsburg, Director, Recreation and Park Department
- IV. Closed session. (Discussion and possible action.)
- Closed session held pursuant to Brown Act section 54956.9(a),(e)(2) and Sunshine Ordinance section 67.10(d) to discuss anticipated litigation as defendant in light of McCutcheon v. Federal Election Commission, No. 12-536.
- Conference with Legal Counsel: Anticipated litigation as defendant
- Number of possible cases: 1
- V. Discussion and possible action on the minutes of the Commission's meeting of March 24, 2014. (Attachment: March 24, 2014 draft minutes.)
- VI. Discussion of Executive Director's Report. An update of important Ethics Commission staff activities since the previous monthly meeting. The written report, which is available at the Commission office and on its website, covers the investigation and enforcement program, revenues, campaign finance disclosure

program, revenues, public financing/campaign finance audit program, lobbyist program, campaign consultant program, and outreach and education. Any of these subjects may potentially be part of the Director's presentation or discussed by the Commission. (Attachment: Executive Director's Report.)

- VII. Items for future meetings. Commissioners may propose items for future agendas and the Commission may determine the priority of these items. (Discussion.)

- VIII. Adjournment.

There will be an opportunity for public comment on each agenda item.

Materials contained in the Commission packets for meetings are available for inspection and copying during regular office hours at the Ethics Commission, 25 Van Ness Avenue, Suite 220, at least 72 hours prior to meetings. Any materials distributed to members of the Ethics Commission within 72 hours of the meeting or after the agenda packet has been delivered to the members are available for public inspection at the Ethics Commission, 25 Van Ness Avenue, Suite 220, San Francisco, during normal office hours.

Cell phones, pagers and similar sound-producing electronic devices: The ringing of and use of cell phones, pagers and similar sound-producing electronic devices are prohibited at this meeting. The Chair may order the removal from the meeting room of any person responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices.

Disability Access: The Ethics Commission meeting will be held in Room 400, City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA. The Commission meeting room is wheelchair accessible. The closest accessible BART station is the Civic Center Station at United Nations Plaza and Market Street. Accessible MUNI lines serving this location are: #42 Downtown Loop, and #71 Haight/Noriega and the F Line to Market and Van Ness and the Metro Stations at Van Ness and Market and at Civic Center. For information about MUNI accessible services call (415) 923-6142. There is accessible curbside parking adjacent to City Hall on Grove Street and Van Ness Avenue and in the vicinity of the Veterans Building at 401 Van Ness Avenue adjacent to Davies Hall and the War Memorial Complex.

To obtain a disability-related modification or accommodation, including auxiliary aids or services, to participate in a meeting, please contact the Ethics Commission at least 48 hours before the meeting, except for Monday meetings, for which the deadline is 4:00 p.m. the previous Friday. Late requests will be honored, if possible. Services available on request include the following: American sign language interpreters or the use of a reader during a meeting, a sound enhancement system, and/or alternative formats of the agenda and minutes. Please contact the Ethics Commission (415) 252-3100 to make arrangements for a disability-related modification or accommodation.

Chemical-Based Products: In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical-based products. Please help the City accommodate these individuals.

**KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE** (Chapter 67 of the San Francisco Administrative Code): Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils, and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

**FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE SUNSHINE ORDINANCE, CONTACT THE SUNSHINE ORDINANCE TASK FORCE**, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102-4689; phone: (415) 554-7724; fax: (415) 554-7854; email: [SOTF@SFGOV.ORG](mailto:SOTF@SFGOV.ORG). Copies of the Sunshine Ordinance can be obtained from the Clerk of the Sunshine Task Force, at the San Francisco Public Library, and on the City's website at <http://www.sfgov.org>

**Lobbyist Registration and Reporting Requirements:** Individuals who influence or attempt to influence local policy or administrative action may be required by the San Francisco Lobbyist Ordinance (San Francisco Campaign and Governmental Conduct Code sections 2.100 – 2.160) to register and report lobbying activity. For more information about the Lobbyist Ordinance, please contact the Ethics Commission at 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102; telephone (415) 252-3100, fax (415) 252-3112; and website: [www.sfgov.org/ethics](http://www.sfgov.org/ethics).

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# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR  
CHAIRPERSON

Date: April 24, 2014

PAUL, A. RENNE  
VICE-CHAIRPERSON

To: Members, Ethics Commission

BRETT ANDREWS  
COMMISSIONER

From: John St. Croix, Executive Director

BEVERLY HAYON  
COMMISSIONER

Re: **Hearing – Ethics Complaint 03-140303**

PETER KEANE  
COMMISSIONER

JOHN ST. CROIX  
EXECUTIVE DIRECTOR

Enclosed is the Report and Recommendation for the above complaint referred from the Sunshine Ordinance Task Force (Complaint No. 12058) "Dominic Maionchi against Phil Ginsburg, General Manager, Recreation and Park Department." The referral was received by the Ethics Commission on March 3, 2014.

This referral will be heard under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance ("Regulations"). Staff has scheduled this matter to be heard during the next regular Ethics Commission meeting at **5:30 PM on Monday, April 28, 2014**, in Room 400 in City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, California 94102.

Both Mr. Maionchi ("Complainant") and Mr. Ginsburg ("Respondent") were issued the Report and Recommendation and were noticed of the hearing by email on April 4, 2014. The Complainant was also noticed by U.S. mail, and the Respondent was also noticed by interoffice mail on the same date as the email notice. A courtesy copy of the Report and Recommendation was sent to the Sunshine Ordinance Task Force on April 4, 2014.

Neither the Complainant nor the Respondent are required to attend the hearing. However, if any party fails to appear, and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, section I.E, then the Commission may make a decision in the party's absence.

Pursuant to Chapter Three of the Regulations, the Executive Director has prepared a written Report and Recommendation summarizing his factual and legal findings. Neither the Complainant nor the Respondent submitted a request for continuance, and neither party submitted a response to the Report and Recommendation.

At the hearing, the Complainant and the Respondent may speak on his or her own behalf, subject to the following time limits: Complainant shall be permitted a ten-minute statement; Respondent shall be permitted a ten-minute statement; and

Complainant shall be permitted a five-minute rebuttal. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing.

In determining whether a violation of the Sunshine Ordinance occurred, the Commission must conclude that, based on a preponderance of the evidence, the Respondent committed a violation of the Sunshine Ordinance. The votes of at least three Commissioners are required to make a finding that a Respondent has committed a willful violation of the Sunshine Ordinance or that a Respondent has committed a non-willful violation of the Sunshine Ordinance.

Copies of all of the documents received from the Task Force regarding this matter have been attached to this notice, as well as a copy of the Regulations and relevant law.



## ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR  
CHAIRPERSON

Date: April 4, 2014

PAUL A. RENNE  
VICE-CHAIRPERSON

To: Phil Ginsburg, Respondent  
Dominic Maionchi, Complainant

BRETT ANDREWS  
COMMISSIONER

Cc: Members, Sunshine Ordinance Task Force

BEVERLY HAYON  
COMMISSIONER

From: John St. Croix, Executive Director

PETER KEANE  
COMMISSIONER

Re: **NOTICE – Hearing – Ethics Complaint 03-140303**

JOHN ST. CROIX  
EXECUTIVE DIRECTOR

Enclosed is the Report and Recommendation for the above complaint referred from the Sunshine Ordinance Task Force (Complaint No. 12058) "Dominic Maionchi against Phil Ginsburg, General Manager, Recreation and Park Department." The referral was received by the Ethics Commission on March 3, 2014.

This referral will be heard under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance ("Regulations"). Staff has scheduled this matter to be heard during the next regular Ethics Commission meeting at **5:30 PM on Monday, April 28, 2014**, in Room 400 in City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, California 94102.

Neither the Complainant nor the Respondent are required to attend. However, if any party fails to appear, and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, section I.E, then the Commission may make a decision in the party's absence. The Complainant or the Respondent must request any continuance of the hearing date in writing. The request must be delivered to the Commission Chairperson, and to all other parties, no later than ten business days before the date of the hearing, or no later than Monday, April 14, 2014.

Under Chapter Three of the Regulations, the Executive Director shall prepare a written Report and Recommendation summarizing his or her factual and legal findings. The Executive Director has 30 days from the receipt of the referral to complete the factual and legal findings. The Executive Director shall issue the Report and Recommendation to the Complainant and Respondent, with a courtesy copy to the Sunshine Ordinance Task Force.

The Complainant and Respondent may each submit a written response to the Director's Report and Recommendation. The response may contain legal arguments, a summary

of evidence, and any mitigating or aggravating information. In support of the response, the Complainant and Respondent may each submit evidence through declaration. If the Complainant or Respondent submits a response, he or she must deliver the response to the Commission, and to all other parties, no later than five business days prior to the date of the hearing, or no later than Monday, April 21, 2014. Any response may not exceed 10 pages, double-spaced, excluding attachments. The Complainant or Respondent must deliver eight copies of the response, or may send the response as an email attachment, to the Executive Director.

The Complainant and the Respondent may speak on his or her own behalf, subject to the following time limits: Complainant shall be permitted a ten-minute statement; Respondent shall be permitted a ten-minute statement; and Complainant shall be permitted a five-minute rebuttal. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing.

In determining whether a violation of the Sunshine Ordinance occurred, the Commission must conclude that, based on a preponderance of the evidence, the Respondent committed a violation of the Sunshine Ordinance. The votes of at least three Commissioners are required to make a finding that a Respondent has committed a willful violation of the Sunshine Ordinance or that a Respondent has committed a non-willful violation of the Sunshine Ordinance.

Copies of all of the documents received from the Task Force regarding this matter have been attached to this notice, as well as a copy of the Regulations and relevant law.



# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

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EXECUTIVE DIRECTOR

## REPORT AND RECOMMENDATION ETHICS COMMISSION COMPLAINT NO. 03-140303

### INTRODUCTION

This matter concerns a referral ("Referral") received by the Ethics Commission ("the Commission") on March 3, 2014, from the Sunshine Ordinance Task Force ("Task Force") regarding its motion concerning complaint number 12058:

"Member Knee, seconded by Member Oka, moved to find the Recreation and Park Department in violation of the Sunshine Ordinance as determined in the Order of Determination (Sections 67.21(e), 67.24(g) and 67.34); referral to the Ethics Commission for enforcement specifically naming Phil Ginsburg, Director Recreation and Park Department responsible."

Pursuant to Chapter Three of the Commission's Regulations for Handling Violations of the Sunshine Ordinance ("Regulations"), this report summarizes applicable legal provisions, evidence gathered, and the Executive Director's factual and legal findings.

The report primarily addresses two main issues: (1) whether the Task Force properly named Phil Ginsburg as Respondent in this matter after the hearing concluded and the was Order issued; and (2) whether the redaction of home address and phone information of individuals who are not City employees on otherwise properly produced

documents violates section 67.26 of the San Francisco Sunshine Ordinance (“Ordinance”).

Pursuant to Chapter Three of the Regulations, and for the reasons described below, this report recommends that the Commission find that Phil Ginsburg did not violate the Ordinance. The Commission is not bound by the Executive Director’s recommendation.

### **SUMMARY OF EVIDENCE GATHERED**

Staff reviewed the Task Force’s complaint procedures, audio recordings of the Task Force meetings<sup>1</sup>, and the documents provided to the Task Force related to this matter (attached as Appendix B). Staff also reviewed the original records request and the Department’s response. Because there was no factual dispute, staff conducted no interviews.

### **SUMMARY OF FACTUAL FINDINGS**

#### **A. Document Request and Response.**

1. On November 22, 2012, Dominic Maionchi made a document request to John Moren at the Recreation and Park Department (“the Department”) for “copies of the contracts for all people on the 90 foot wait list.” (Appx. B, p. 44.)

2. On December 3, 2012, Olive Gong, Custodian of Records for the Department, provided Mr. Maionchi with a copy of the San Francisco Marina Wait List Renewal Application (“application”) for each of the five individuals on the Marina wait list.<sup>2</sup> (Appx B, p. 43.)

3. Each application contained a redaction over the home address and home phone number of the applicant. No other information was redacted. (Appx. B, pp. 45 – 49.)

4. Ms. Gong provided the legal justification for the redactions citing an individual’s right to privacy under California Constitution, Article 1, section 1; and California Government Code,

<sup>1</sup> Because of the inconsistencies between the Referral and the Order, staff reviewed the oral motions made at each meeting related to this matter.

<sup>2</sup> The department maintains a wait list for individuals who want to hold a berth at the San Francisco Marina. An applicant must pay \$75.00 per fiscal year to hold his or her place. As berths become available, they are offered to individuals remaining on the wait list in order of seniority. Once a berth becomes available, an applicant has 15 days to accept the lease offer for the berth.

sections 6254(c) and 6254(k). She further stated that Government Code, section 6250, and Ordinance, section 67.1(g), acknowledge the importance of protecting personal privacy when disclosing public records. (Appx. B, p. 43.)<sup>3</sup>

#### B. Task Force Complaint and Hearings.

1. On December 12, 2012, Mr. Maionchi filed a complaint with the Task Force, alleging that Olive Gong was the contact for the Department, and that the response to his request violated Ordinance, sections 67.21(b), 67.24(e)(1), and 67.24(i). (Appx. B, p. 85.) Ms. Gong responded to the complaint with legal justifications for the redactions. (Appx. B, pp. 88 – 94.)

2. The Task Force held the hearing on this matter on May 1, 2013, and concluded that the redactions violated Ordinance, section 67.26. (Appx. B, pp. 7, 22 – 24.)<sup>4</sup> Ms. Gong and Mr. Maionchi attended. There was no dispute that the five applications were the only responsive documents to the request.

3. On June 12, 2013, the Task Force issued the following written Order of Determination (“Order”): “[the Department] violated Section 67.26 of the [Ordinance] for illegal redaction of personal information contained in public records. The agency shall release the unredacted records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee [“CAC”] on July 16, 2013.”<sup>5</sup> The Order named only Ms. Gong as the Respondent. (Appx. B, pp. 3 – 4.)

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<sup>3</sup> The Office of the City Attorney provides general guidance to City departments regarding their obligations under the Government Code and Ordinance in its Good Government Guide. While this guide is not legal advice, it is the primary resource for all City departments and officials to determine how best to comply with various good government provisions. In the Good Government Guide, the City Attorney implies that a balancing test may be applied regarding privacy exemptions and that the general rule is that departments should not disclose home addresses, home phone numbers, and personal e-mail addresses of members of the public. (See GGG, Ch. Three, § II.G.2.b, Ed. 2010-2011, p. 93 – 94.) The Good Government Guide does not cite Ordinance, section 67.24(i), for this proposition.

<sup>4</sup> Only draft minutes were available on the Task Force’s website for each meeting referenced as of the date of issuance of this Report and Recommendation.

<sup>5</sup> The Order did not contain violations of Ordinance, sections 67.21(e), 67.24(g) and 67.34, or name Phil Ginsburg as “responsible” as stated in the Referral.

4. On July 16, 2013, the CAC convened to monitor compliance with the Order. (Appx. B, pp. 13 and 33.) Ms. Gong and Mr. Maionchi were both present, and the CAC voted to send the matter back to the full Task Force with a recommendation that the Task Force refer the matter to the Commission for a willful violation of the Ordinance. (Appx. B, p. 34.) The motion did not include adding Phil Ginsburg as the Respondent.<sup>6</sup> (*Id.*)

5. On September 23, 2013, the Task Force sent a “NOTICE OF HEARING: Task Force Meeting October 2, 2013.” (Appx. B, p. 51.) The notice was sent to 20 recipients, and stated that each recipient was either a complainant or respondent in one of six Task Force complaints. Ms. Gong, as well as Mr. Ginsburg, and another Department employee, Sarah Ballard, were included in the notice.

6. On September 26, 2013, the Task Force sent an email to Ms. Gong, copied to Mr. Ginsburg and Ms. Ballard, stating that “[a]s a reminder the [Task Force] requested the presence of Mr. Ginsburg and Ms. Ballard to attend the [meeting].” (Appx. B, p. 50.)

7. The matter was not heard at the October meeting, and a new notice was sent on October 24, 2013, in the same format as the notice sent on September 23, regarding the Task Force meeting on November 6, 2013. (Appx. B, p. 54.)

8. On November 6, 2013, the Task Force met and voted to refer the matter to the Commission. (Appx. B, pp. 16 and 36 – 37.) The Task Force included additional violations and named Phil Ginsburg as “responsible” in the motion to refer the matter to the Commission.<sup>7</sup>

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<sup>6</sup> Staff reviewed the oral motion made at the CAC meeting of July 16, 2013, and confirmed that the motion was to refer the “matter” to the Task Force, without naming Mr. Ginsburg in the motion. The CAC also included a violation against the City Attorney’s Office, but that issue was not pursued by the Task Force.

<sup>7</sup> The agenda for the November meeting did not indicate that the Task Force was considering additional violations. In addition, just prior to making the motion, the Chair asked if there was a motion to find a violation, and the maker of the motion stated that a violation has already been found and that this matter was not being re-adjudicated. The maker then proceeded to add additional violations to the motion. (Audio recording, Task Force Meeting, November 6, 2013, at time mark 2:06:19.)

9. The Task Force approved the motion as reflected in the written Referral. Ms. Gong was not referenced in the motion to refer the matter to the Commission.<sup>8</sup> (Appx. B, pp. 36 – 37.)

10. The Task Force member moving for referral at the November 6, 2013, meeting included Ordinance, section 67.34 in the referral, so that the department head, Mr. Ginsburg, could be held responsible for the violation.<sup>9</sup> The member also stated that Ordinance, section 67.21(e), was included in the motion because the Department did not send a representative to the Task Force meetings who was “sufficiently” knowledgeable, and included Ordinance, section 67.24(g), because the Ordinance prohibits reliance on Government Code, section 6255.

### **SUMMARY OF APPLICABLE LAW**<sup>10</sup>

#### **A. City Law Relevant to the Procedural Issues in This Matter.**

1. Ordinance, section 67.21(e), empowers the Task Force to conduct a public hearing concerning a records request denial.

2. Pursuant to the Task Force’s Public Complaint Procedure (“CP”), after considering all the testimony at the hearing, the Task Force must vote on and notify the complainant and respondent in writing of any Order or other directive, and the CAC is responsible for monitoring compliance with that Order or directive. (CP, §§ D.3, D.4 and F.1.)

3. If the CAC determines that there is a failure to comply with the Order, the CAC may recommend that the Task Force notify the Commission to take “measures they deem necessary to ensure compliance with the Ordinance.”<sup>11</sup> (CP, § F.2.)

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<sup>8</sup> Although, Ms. Gong was not included in the motion to refer, the written referral repeatedly stated that Ms. Gong was the Respondent at the hearing, the CAC meeting, and at the November meeting to refer the matter. The written referral was delivered to the Commission as “referral to [the Commission] – Dominic Maionchi against Phil Ginsburg.”

<sup>9</sup> The written Referral, inconsistent with the motion, indicated that it was made pursuant to Ordinance, section 67.30(c), which requires the Commission to handle a referral pursuant to Chapter Two of the Regulations.

<sup>10</sup> Staff has attached relevant code sections and legal authority to this Report and Recommendation in Appendix A.

<sup>11</sup> The Task Force may also notify the District Attorney, the Attorney General, and/or the Board of Supervisors.

4. Neither the Ordinance nor the CP indicate that the Task Force may find additional violations of the Ordinance, or add respondents after the conclusion of the hearing on the records request denial and the issuance of an order, whether at a CAC meeting or at a subsequent meeting of the full Task Force to vote on a referral to the Commission.<sup>12</sup>

5. Referrals of willful violations (Ordinance, section 67.34) by department heads are handled pursuant to Chapter Three of the Regulations. For the Commission to find a willful violation of the Ordinance, it must conclude that, based on a preponderance of the evidence, a respondent acted or failed to act with the knowledge that such act or failure to act was a violation of the Ordinance. (Regulations, Ch. One, § II.U; and Ch. Three, § III.B.2.)

B. State Law Relevant to the Redaction of Produced Documents in This Matter.

1. Privacy is a constitutional right in California that is recognized in the California Public Records Act (“PRA”). (Cal. Const., Art. 1, § 1; PRA, § 6250.)

2. PRA, section 6254(c), exempts from disclosure “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” Personal information may be withheld (or redacted) if the public interest in nondisclosure clearly outweighs the public interest in disclosure. (*City of San Jose v. Superior Court* (1999) 74 Cal App. 4th 1008, 1018 – 1020.) A court undertaking this balancing test in the context of an individual’s home address will consider whether disclosure of that address will “shed light on an agency’s performance of its statutory duties.” (*Id.* at 1019, quoting *Voinche v. F.B.I.* (D.D.C. 1996) 940 F. Supp. 323, 330.)

3. Under this standard, the refusal to provide home addresses of residents who made airport noise complaints to the City of San Jose was permissible under PRA, section 6254(c). (*City of San Jose v. Superior Court, supra*, 74 Cal App. 4th 1008.) Conversely, the disclosure of names

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<sup>12</sup> The Task Force may reconsider a matter upon petition with an offer of proof as to new information. (CP, § E.)

and addresses of excessive water users was required under this standard. (*New York Times Co. v. Superior Court* (1990) 218 Cal. App. 3d 1579.)<sup>13</sup>

4. The California Supreme Court has also found that a public entity's release of an employee's personal address and phone number may constitute an unconstitutional and actionable invasion of privacy if a balancing of interests does not favor disclosure of that information. (*County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal. 4th 905.)

#### C. City Law Relevant to the Redaction of Produced Documents in This Matter.

1. PRA, section 6253(e), provides that local agencies may adopt requirements that allow greater access to records than prescribed by the minimum standards set forth in the PRA, except as otherwise prohibited by law. The Ordinance provides for such additional access.

2. Ordinance, section 67.24(i), prohibits City agencies from asserting "an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of [the Ordinance] providing for withholding of the specific type of information in question or on an express and specific exemption provided by [the PRA] that is not forbidden by [the Ordinance]."

3. Ordinance, section 67.26, provides in relevant part that "[i]nformation that is exempt from disclosure shall be masked, deleted or otherwise segregated in order that the nonexempt portion of a requested record may be released, and keyed by footnote or other clear reference to the appropriate justification for withholding required by section 67.27 of [the Ordinance]."

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<sup>13</sup> Courts interpreting PRA, section 6254(c), often refer to cases construing the federal Freedom of Information Act, upon which the Government Code is modeled. In this regard, federal courts have found that the workings of agencies are not better understood by the disclosure of identity of employees, or of private citizens who wrote to government officials (*Voinche v. FBI*, *supra*, 940 F. Supp. 323, 329 – 330) and have upheld the nondisclosure of names and addresses on an employee payroll. (*Painting Industry of Hawaii v. Dep't. of Air Force* (9th Cir. 1994) 26 F.3d 1479.)

4. Ordinance, section 67.27, indicates that documents may be withheld based a specific PRA or Ordinance exemption, on statutory authority outside the PRA, and “on the basis that disclosure would incur civil or criminal liability,” but any such withholding must cite statutory or case law supporting that position.

5. San Francisco Administrative Code, section 12.M.2(a), states that “[t]he City shall not disclose Private Information to any person or entity unless specifically authorized to do so by the subject individual or by Contract or where required by Federal or State law or judicial order.”<sup>14</sup>

#### D. Other Relevant City Laws in This Matter.

1. Ordinance, section 67.21(e) provides in relevant part that “[a]n authorized representative of the custodian of the public records requested shall attend any [Task Force] hearing and explain the basis for its decision to withhold the records requested.”

2. Ordinance, section 67.24(g), states that “[n]either the City nor any office, employee, or agent thereof may assert [PRA] Section 6255 or any similar provision as the basis for withholding any documents or information requested under this ordinance.”

### LEGAL FINDINGS

1. This matter concerns a complaint that Phil Ginsburg willfully violated the Ordinance. Any finding of a willful violation must be supported by a preponderance of the evidence.

2. No authority exists in either the Ordinance or the CP which permitted the Task Force to name Phil Ginsburg as “responsible” after the hearing on the matter concluded and the Order was issued. The Task Force failed to adhere to its procedure, and deprived Mr. Ginsburg of due process as he was not able to contest the complaint prior to the issuance of the Order.<sup>15</sup>

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<sup>14</sup> “Private Information” means “any information that (1) could be used to identify an individual, including without limitation name, address, social security number, medical information, financial information, date and location of birth, and names of relative; or (2) the law forbids any person from disclosing.” (S.F. Admin. Code, § 12.M.1(e).)

<sup>15</sup> A finding of “willful failure” is deemed to be official misconduct. (S.F. Admin. Code, § 67.34). A charge of official misconduct is serious and could result in the removal of the official from office. (S.F. Charter, § 15.105.)

(*Louisville & N. R. Co. v. Schmidt* (1900) 177 U.S. 230, 236 [essential elements of due process of law are notice and opportunity to defend]; *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 – 315.)

3. Although the Task Force summarily decided at its November meeting that a department head is ultimately responsible for the operations of his or her department and included Mr. Ginsburg in the Referral, it heard no evidence with respect to this issue at the hearing held on May 1, 2013. Ms. Gong stated at the hearing (and at subsequent meetings) that she was responsible for the records request, and that she is the Department’s Custodian of Records. Therefore, Mr. Ginsburg did not commit a willful (or non-willful) violation of the Ordinance and the Commission may dismiss this matter on that basis.

4. The Ordinance is clear that withholding of public records may not be based on a balancing test like the one regarding privacy contained in PRA, section 6254(c)<sup>16 17</sup>, and that the Ordinance’s provisions supersede other local laws. (S.F. Admin. Code, §§ 67.24(i) and 67.36.) However, redaction of the personal addresses and phone numbers of City residents is likely not contrary to the Ordinance because the disclosure of such information:

(a) would appear at odds with the Ordinance’s recognition of the right to privacy (Ordinance, § 67.1(g)[“private . . . individuals . . . have rights to privacy that must be respected”]);

(b) would not appear to further the Ordinance’s purpose of helping “the people to know what their government . . . [is] doing.” (Ordinance, § 67.1(d).)

(c) could potentially give rise to an invasion of privacy claim under the *County of Los Angeles* case, which may justify the withholding under Ordinance, section 67.27(c);

<sup>16</sup> The exemptions contained in PRA, section 6254(k), not related to privilege, also requires a balancing test.

<sup>17</sup> The Task Force based its determination that the address and phone number of each applicant should be disclosed in part by considering that the applications were contracts pursuant to Ordinance, section 67.24(e). Staff questions the applicability of that provision, which concerns bids, RFPs, and related contracts, to the applications at issue here because the purpose of the fee and application was to hold a place in line for the opportunity to enter into an agreement with the City.

(d) would be impermissible under Administrative Code, section 12.M.2, which was enacted in 2006 via voter initiative (after the Ordinance) and more specifically addresses disclosure of private information, and thus appears to limit the scope of the Ordinance’s disclosure provisions with respect to private information (Cal. Code Civ. Proc., § 1859; *In re Greg F.* (2012) 55 Cal. 4th 393, 407; *United States v. Juvenile Male* (9th Cir. 2012) 670 F.3d 999, 1008 [“[w]here two statutes conflict, the later-enacted, more specific provision generally governs”]); and

(e) would lead to the incongruous result of higher privacy protections for City employees than City residents. (See e.g. S.F. Admin. Code, § 67.24(c)(2) [employee’s home address and phone number must be redacted from resume if disclosed].)

Although redacting the home address and phone number may be permissible under the Ordinance, Ms. Gong appears to have violated Ordinance, section 67.26, by not citing the “appropriate justification” for the redactions as required by that section.<sup>18</sup>

5. Even if impermissible under the Ordinance, the redactions and refusal to release home addresses and home phone numbers of members of the public were nevertheless not a willful act under Ordinance, section 67.34, given state and federal law privacy protections for address and phone information, and the general advice issued by the Good Government Guide.

6. Ms. Gong attended the hearing on May 1, 2013, the CAC meeting on July 16, 2013, and the Referral meeting on November 6, 2013, in compliance with Ordinance, section 67.21(e).

7. Ms. Gong did not assert in her response to the records request that PRA, section 6255, was the basis for the redactions, in compliance with Ordinance, section 67.24(g).

### **RECOMMENDATION**

Staff recommends that the Commission find that Phil Ginsburg did not violate the Ordinance.

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<sup>18</sup> Ms. Gong was not referred to the Commission, and thus is not a respondent before the Commission with respect to this Referral.

## APPENDIX A

Authority	Starts at Bates Stamp
<u>State Constitution, Statutes, and Codes</u>	
California Constitution, Article 1, section 1	001
California Code of Civil Procedure, section 1859	037
Public Records Act (PRA)	002
<u>City Charter, Codes and Ordinances</u>	
San Francisco Administrative Code, Chapter 12M	039
San Francisco City Charter, Article XV	218
San Francisco Sunshine Ordinance	041
<u>Agency Regulations, Procedures, and Guides</u>	
Ethics Commission Regulations for Handling Violations of the Sunshine Ordinance	057
Good Government Guide, Part Three	073
Sunshine Ordinance Task Force Complaint Procedure	052
<u>Federal Cases</u>	
<i>Louisville &amp; N. R. Co. v. Schmidt</i> (1900) 177 U.S. 230	169
<i>Mullane v. Cent. Hanover Bank &amp; Trust Co.</i> (1950) 339 U.S. 306	175
<i>Painting Industry of Hawaii v. Dep't. of Air Force</i> (9th Cir. 1994) 26 F.3d 1479	199
<i>United States v. Juvenile Male</i> (9th Cir. 2012) 670 F.3d 999	185
<i>Voinche v. FBI</i> (D.D.C. 1996) 940 F. Supp. 323	208
<u>State Cases</u>	
<i>City of San Jose v. Superior Court</i> (1999) 74 Cal. App. 4th 1008	156
<i>County of Los Angeles v. Los Angeles County Employee Relations Commission</i> (2013) 56 Cal. 4th 905	104
<i>In re Greg F.</i> (2012) 55 Cal. 4th 393	125
<i>New York Times v. Superior Court</i> (1990) 218 Cal. App. 3d 1579	150





# California LEGISLATIVE INFORMATION

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## CALIFORNIA CONSTITUTION - CONS

### ARTICLE I DECLARATION OF RIGHTS [SECTION 1 - SEC. 31] (Article 1 adopted 1879.)

**SECTION 1.** All people are by nature free and Independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

(Sec. 1 added Nov. 5, 1974, by Proposition 7, Resolution Chapter 90, 1974.)

**SEC. 2.** (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

(b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

As used in this subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

(Sec. 2 amended June 3, 1980, by Prop. 5, Res.Ch. 77, 1978.)

**SEC. 3.** (a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

(Sec. 3 amended Nov. 2, 2004, by Prop. 59, Res.Ch. 1, 2004.)

**SEC. 4.** Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.



# California

## LEGISLATIVE INFORMATION

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## GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] (*Title 1 enacted by Stats. 1943, Ch. 134.*)DIVISION 7. MISCELLANEOUS [5000 - 7598] (*Division 7 enacted by Stats. 1943, Ch. 134.*)CHAPTER 3.5. Inspection of Public Records [6250 - 6276.48] (*Chapter 3.5 added by Stats. 1968, Ch. 1473.*)ARTICLE 1. General Provisions [6250 - 6270] (*Article 1 heading added by Stats. 1998, Ch. 620, Sec. 1.*)

**6250.** In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (*Amended by Stats. 1970, Ch. 575.*)

**6251.** This chapter shall be known and may be cited as the California Public Records Act. (*Added by Stats. 1968, Ch. 1473.*)

**6252.** As used in this chapter:

- (a) "Local agency" includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other local public agency; or entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952.
- (b) "Member of the public" means any person, except a member, agent, officer, or employee of a federal, state, or local agency acting within the scope of his or her membership, agency, office, or employment.
- (c) "Person" includes any natural person, corporation, partnership, limited liability company, firm, or association.
- (d) "Public agency" means any state or local agency.
- (e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975.
- (f) "State agency" means every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.
- (g) "Writing" means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. (*Amended by Stats. 2004, Ch. 937, Sec. 1. Effective January 1, 2005.*)

**6252.5.** Notwithstanding the definition of "member of the public" in Section 6252, an elected member or officer of any state or local agency is entitled to access to public records of that agency on the same basis as any other person. Nothing in this section shall limit the ability of elected members or officers to access public records permitted by law in the administration of their duties.

This section does not constitute a change in, but is declaratory of, existing law.

(*Added by Stats. 1998, Ch. 620, Sec. 3. Effective January 1, 1999.*)

**6252.5.** Notwithstanding paragraph (2) of subdivision (a) of Section 827 of the Welfare and Institutions Code, after the death of a foster child who is a minor, the name, date of birth, and date of death of the child shall be subject to disclosure by the county child welfare agency pursuant to this chapter.

(*Added by Stats. 2003, Ch. 847, Sec. 3. Effective January 1, 2004.*)

**6252.7.** Notwithstanding Section 6252.5 or any other provision of law, when the members of a legislative body of a local agency are authorized to access a writing of the body or of the agency as permitted by law in the administration of their duties, the local agency, as defined in Section 54951, shall not discriminate between or among any of those members as to which writing or portion thereof is made available or when it is made available.

(*Added by Stats. 2008, Ch. 63, Sec. 2. Effective January 1, 2009.*)

**6253.** (a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available

to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(c) Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
- (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
- (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.
- (d) Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial.
- (e) Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.

(Amended by Stats. 2001, Ch. 355, Sec. 2. Effective January 1, 2002.)

**6253.1.** (a) When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records, shall do all of the following, to the extent reasonable under the circumstances:

- (1) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.
- (2) Describe the information technology and physical location in which the records exist.
- (3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.
- (b) The requirements of paragraph (1) of subdivision (a) shall be deemed to have been satisfied if the public agency is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records.
- (c) The requirements of subdivision (a) are in addition to any action required of a public agency by Section 6253.
- (d) This section shall not apply to a request for public records if any of the following applies:
  - (1) The public agency makes available the requested records pursuant to Section 6253.
  - (2) The public agency determines that the request should be denied and bases that determination solely on an exemption listed in Section 6254.
  - (3) The public agency makes available an index of its records.

(Added by Stats. 2001, Ch. 355, Sec. 3. Effective January 1, 2002.)

**6253.2.** (a) Notwithstanding any other provision of this chapter to the contrary, information regarding persons paid by the state to provide in-home supportive services pursuant to Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code, or services provided pursuant to Section 14132.95, 14132.952, or 14132.956 of the Welfare and Institutions Code, is not subject to public disclosure pursuant to this chapter, except as provided in subdivision (b).

- (b) Copies of names, addresses, and telephone numbers of persons described in subdivision (a) shall be made available, upon request, to an exclusive bargaining agent and to any labor organization seeking representation rights pursuant to Section 12301.6 or 12302.25 of the Welfare and Institutions Code or the In-Home Supportive Services Employer-Employee Relations Act (Title 23 (commencing with Section 110000)). This information shall not be used by the receiving entity for any purpose other than the employee organizing, representation, and assistance activities of the labor organization.
- (c) This section applies solely to individuals who provide services under the In-Home Supportive Services Program (Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code), the Personal Care Services Program pursuant to Section 14132.95 of the Welfare and Institutions Code, the In-Home Supportive Services Plus Option pursuant to Section 14132.952 of the Welfare and Institutions Code, or the Community First Choice Option pursuant to Section 14132.956 of the Welfare and Institutions Code.
- (d) Nothing in this section is intended to alter or shall be interpreted to alter the rights of parties under the In-Home Supportive Services Employer-Employee Relations Act (Title 23 (commencing with Section 110000)) or any other labor relations law.
- (e) This section shall be inoperative if the Coordinated Care Initiative becomes inoperative pursuant to Section 34 of the act that

added this subdivision:

*(Amended (as amended by Stats. 2012, Ch. 439, Sec. 2) by Stats. 2013, Ch. 37, Sec. 1. Effective June 27, 2013. Conditionally Inoperative as prescribed by its own provisions and Sec. 34 of Ch. 37. If this version becomes Inoperative, the version as amended by Sec. 2 of Ch. 37 becomes operative.)*

**6253.2.** (a) Notwithstanding any other provision of this chapter to the contrary, information regarding persons paid by the state to provide in-home supportive services pursuant to Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code or personal care services pursuant to Section 14132.95 of the Welfare and Institutions Code, is not subject to public disclosure pursuant to this chapter, except as provided in subdivision (b).

(b) Copies of names, addresses, and telephone numbers of persons described in subdivision (a) shall be made available, upon request, to an exclusive bargaining agent and to any labor organization seeking representation rights pursuant to subdivision (c) of Section 12301.6 or Section 12302.25 of the Welfare and Institutions Code or Chapter 10 (commencing with Section 3500) of Division 4 of Title 1. This information shall not be used by the receiving entity for any purpose other than the employee organizing, representation, and assistance activities of the labor organization.

(c) This section applies solely to individuals who provide services under the In-Home Supportive Services Program (Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code) or the Personal Care Services Program pursuant to Section 14132.95 of the Welfare and Institutions Code.

(d) Nothing in this section is intended to alter or shall be interpreted to alter the rights of parties under the Meyers-Millias-Brown Act (Chapter 10 (commencing with Section 3500) of Division 4) or any other labor relations law.

(e) This section shall be operative only if Section 1 of the act that added this subdivision becomes inoperative pursuant to subdivision (e) of that Section 1.

*(Amended (as amended by Stats. 2012, Ch. 439, Sec. 1) by Stats. 2013, Ch. 37, Sec. 2. Effective June 27, 2013. This version is conditionally operative, as prescribed by its own provisions.)*

**6253.3.** A state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter.

*(Added by Stats. 2008, Ch. 62, Sec. 1. Effective January 1, 2009.)*

**6253.31.** Notwithstanding any contract term to the contrary, a contract entered into by a state or local agency subject to this chapter, including the University of California, that requires a private entity to review, audit, or report on any aspect of that agency shall be public to the extent the contract is otherwise subject to disclosure under this chapter.

*(Added by Stats. 2008, Ch. 62, Sec. 2. Effective January 1, 2009.)*

**6253.4.** (a) Every agency may adopt regulations stating the procedures to be followed when making its records available in accordance with this section.

The following state and local bodies shall establish written guidelines for accessibility of records. A copy of these guidelines shall be posted in a conspicuous public place at the offices of these bodies, and a copy of the guidelines shall be available upon request free of charge to any person requesting that body's records:

Department of Motor Vehicles

Department of Consumer Affairs

Transportation Agency

Bureau of Real Estate

Department of Corrections and Rehabilitation

Division of Juvenile Justice

Department of Justice

Department of Insurance

Department of Business Oversight

Department of Managed Health Care

Secretary of State

State Air Resources Board

Department of Water Resources

Department of Parks and Recreation

San Francisco Bay Conservation and Development Commission

State Board of Equalization

State Department of Health Care Services

Employment Development Department

State Department of Public Health

State Department of Social Services

State Department of State Hospitals

State Department of Developmental Services

Public Employees' Retirement System

Teachers' Retirement Board

Department of Industrial Relations

Department of General Services

Department of Veterans Affairs

Public Utilities Commission

California Coastal Commission

State Water Resources Control Board

San Francisco Bay Area Rapid Transit District

All regional water quality control boards

Los Angeles County Air Pollution Control District

Bay Area Air Pollution Control District

Golden Gate Bridge, Highway and Transportation District

Department of Toxic Substances Control

Office of Environmental Health Hazard Assessment

(b) Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public. The guidelines and regulations adopted pursuant to this section shall not operate to limit the hours public records are open for inspection as prescribed in Section 6253.

(Amended by Stats. 2013, Ch. 22, Sec. 7. Effective June 27, 2013. Operative July 1, 2013, by Sec. 110 of Ch. 22.)

**8253.5.** Notwithstanding Sections 6252 and 6253, statewide, county, city, and district initiative, referendum, and recall petitions, petitions circulated pursuant to Section 5091 of the Education Code, petitions for the reorganization of school districts submitted pursuant to Article 1 (commencing with Section 35700) of Chapter 4 of Part 21 of the Education Code, petitions for the reorganization of community college districts submitted pursuant to Part 46 (commencing with Section 74000) of the Education Code and all memoranda prepared by the county elections officials in the examination of the petitions indicating which registered voters have signed particular petitions shall not be deemed to be public records and shall not be open to inspection except by the public officer or public employees who have the duty of receiving, examining or preserving the petitions or who are responsible for the preparation of that memoranda and, if the petition is found to be insufficient, by the proponents of the petition and the representatives of the proponents as may be designated by the proponents in writing in order to determine which signatures were disqualified and the reasons therefor. However, the Attorney General, the Secretary of State, the Fair Political Practices Commission, a district attorney, a school district or a community college district attorney, and a city attorney shall be permitted to examine the material upon approval of the appropriate superior court.

If the proponents of a petition are permitted to examine the petition and memoranda, the examination shall commence not later than 21 days after certification of insufficiency.

(a) As used in this section, "petition" shall mean any petition to which a registered voter has affixed his or her signature.

(b) As used in this section "proponents of the petition" means the following:

(1) For statewide initiative and referendum measures, the person or persons who submit a draft of a petition proposing the measure to the Attorney General with a request that he or she prepare a title and summary of the chief purpose and points of the proposed measure.

(2) For other initiative and referendum measures, the person or persons who publish a notice of intention to circulate petitions, or, where publication is not required, who file petitions with the elections official.

(3) For recall measures, the person or persons defined in Section 343 of the Elections Code.

(4) For petitions circulated pursuant to Section 5091 of the Education Code, the person or persons having charge of the petition who submit the petition to the county superintendent of schools.

(5) For petitions circulated pursuant to Article 1 (commencing with Section 35700) of Chapter 4 of Part 21 of the Education Code, the person or persons designated as chief petitioners under Section 35701 of the Education Code.

(6) For petitions circulated pursuant to Part 46 (commencing with Section 74000) of the Education Code, the person or persons designated as chief petitioners under Sections 74102, 74133, and 74152 of the Education Code.

(Amended by Stats. 1994, Ch. 923, Sec. 32. Effective January 1, 1995.)

**8253.6.** (a) Notwithstanding the provisions of Sections 6252 and 6253, information compiled by public officers or public employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets, made in accordance with any federal or state law, or other data that would reveal the identity of the requester, shall not be deemed to be public records and shall not be provided to any person other than public officers or public employees who are responsible for receiving those requests and processing the same.

(b) Nothing contained in subdivision (a) shall be construed as prohibiting any person who is otherwise authorized by law from examining election materials, including, but not limited to, affidavits of registration, provided that requests for bilingual ballots or ballot pamphlets shall be subject to the restrictions contained in subdivision (a).

(Amended by Stats. 1985, Ch. 1129, Sec. 1.)

**6253.9.** (a) Every final enforcement order issued by an agency listed in subdivision (b) under any provision of law that is administered by an entity listed in subdivision (b), shall be displayed on the entity's Internet website, if the final enforcement order is a public record that is not exempt from disclosure pursuant to this chapter.

(b) This section applies to the California Environmental Protection Agency and to all of the following entities within the agency:

- (1) The State Air Resources Board.
- (2) The California Integrated Waste Management Board.
- (3) The State Water Resources Control Board, and each California regional water quality control board.
- (4) The Department of Pesticide Regulation.
- (5) The Department of Toxic Substances Control.

(c) (1) Except as provided in paragraph (2), for purposes of this section, an enforcement order is final when the time for judicial review has expired on or after January 1, 2001, or when all means of judicial review have been exhausted on or after January 1, 2001.

(2) In addition to the requirements of paragraph (1), with regard to a final enforcement order issued by the State Water Resources Control Board or a California regional water quality control board, this section shall apply only to a final enforcement order adopted by that board or a regional board at a public meeting.

(d) An order posted pursuant to this section shall be posted for not less than one year.

(e) The California Environmental Protection Agency shall oversee the implementation of this section.

(f) This section shall become operative April 1, 2001.

*(Added by Stats. 2000, Ch. 783, Sec. 1. Effective January 1, 2001. Section operative April 1, 2001, by its own provisions.)*

**6253.9.** (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:

(1) The agency shall make the information available in any electronic format in which it holds the information.

(2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

(b) Notwithstanding paragraph (2) of subdivision (a), the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:

(1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.

(2) The request would require data compilation, extraction, or programming to produce the record.

(c) Nothing in this section shall be construed to require the public agency to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format.

(d) If the request is for information in other than electronic format, and the information also is in electronic format, the agency may inform the requester that the information is available in electronic format.

(e) Nothing in this section shall be construed to permit an agency to make information available only in an electronic format.

(f) Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.

(g) Nothing in this section shall be construed to permit public access to records held by any agency to which access is otherwise restricted by statute.

*(Added by Stats. 2000, Ch. 982, Sec. 2. Effective January 1, 2001.)*

**6254.** Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

(d) Contained in or related to any of the following:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state

agency referred to in paragraph (1).

(4) Information received in confidence by any state agency referred to in paragraph (1).

(e) Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.

(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflects the analysis or conclusions of the investigating officer.

Customer lists provided to a state or local police agency by an alarm or security company at the request of the agency shall be construed to be records subject to this subdivision.

Notwithstanding any other provision of this subdivision, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of a crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 464.9, or 647.6 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined in any of the sections of the Penal Code set forth in this subdivision may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code. However, the address of the victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 464.9, or 647.6 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph may not be used directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury. Nothing in this paragraph shall be construed to prohibit or limit a scholarly, journalistic, political, or government use of address information obtained pursuant to this paragraph.

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with Section 99150) of Part 65 of Division 14 of Title 3 of the Education Code.

(h) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision.

(i) Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information.

(j) Library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for reference or exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on the borrowers.

(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to,

provisions of the Evidence Code relating to privilege.

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary. However, public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter.

(m) In the custody of or maintained by the Legislative Counsel, except those records in the public database maintained by the Legislative Counsel that are described in Section 10248.

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for.

(o) Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health and Safety Code, where an authorized officer of the California Pollution Control Financing Authority determines that disclosure of the financial data would be competitively injurious to the applicant and the data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application that are subject to disclosure under this chapter.

(p) Records of state agencies related to activities governed by Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525), and Chapter 12 (commencing with Section 3560) of Division 4, that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters. Nothing in this subdivision shall be construed to limit the disclosure duties of a state agency with respect to any other records relating to the activities governed by the employee relations acts referred to in this subdivision.

(q) (1) Records of state agencies related to activities governed by Article 2.6 (commencing with Section 14081), Article 2.8 (commencing with Section 14087.5), and Article 2.91 (commencing with Section 14089) of Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code, that reveal the special negotiator's deliberative processes, discussions, communications, or any other portion of the negotiations with providers of health care services, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy, or that provide instruction, advice, or training to employees.

(2) Except for the portion of a contract containing the rates of payment, contracts for inpatient services entered into pursuant to these articles, on or after April 1, 1984, shall be open to inspection one year after they are fully executed. If a contract for inpatient services that is entered into prior to April 1, 1984, is amended on or after April 1, 1984, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after it is fully executed. If the California Medical Assistance Commission enters into contracts with health care providers for other than inpatient hospital services, those contracts shall be open to inspection one year after they are fully executed.

(3) Three years after a contract or amendment is open to inspection under this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee and the Legislative Analyst's Office. The committee and that office shall maintain the confidentiality of the contracts and amendments until the time a contract or amendment is fully open to inspection by the public.

(r) Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.

(s) A final accreditation report of the Joint Commission on Accreditation of Hospitals that has been transmitted to the State Department of Health Care Services pursuant to subdivision (b) of Section 1282 of the Health and Safety Code.

(t) Records of a local hospital district, formed pursuant to Division 23 (commencing with Section 32000) of the Health and Safety Code, or the records of a municipal hospital, formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Part 2 of Division 3 of Title 4 of this code, that relate to any contract with an insurer or nonprofit hospital service plan for inpatient or outpatient services for alternative rates pursuant to Section 10133 of the Insurance Code. However, the record shall be open to inspection within one year after the contract is fully executed.

(u) (1) Information contained in applications for licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department that indicates when or where the applicant is vulnerable to attack or that concerns the applicant's medical or psychological history or that of members of his or her family.

(2) The home address and telephone number of prosecutors, public defenders, peace officers, judges, court commissioners, and magistrates that are set forth in applications for licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(3) The home address and telephone number of prosecutors, public defenders, peace officers, judges, court commissioners, and magistrates that are set forth in licenses to carry firearms issued pursuant to Section 26150, 26155, 26170, or 26215 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(v) (1) Records of the Managed Risk Medical Insurance Board and the State Department of Health Care Services related to activities governed by Part 6.3 (commencing with Section 12695), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), and Part 6.7 (commencing with Section 12739.70) of Division 2 of the Insurance Code, and Chapter 2 (commencing with Section 15850) of Part 3.3 of Division 9 of the Welfare and Institutions Code, and that reveal any of the following:

(A) The deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board or the department, entities with which the board or the department is considering a contract, or entities with which the board is considering or enters into any other arrangement under which the board or the department provides,

receives, or arranges services or reimbursement.

(B) The impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff or the department or its staff, or records that provide instructions, advice, or training to their employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.3 (commencing with Section 12695), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), or Part 6.7 (commencing with Section 12739.70) of Division 2 of the Insurance Code, or Chapter 2.2 (commencing with Section 15850) of Part 3.3 of Division 9 of the Welfare and Institutions Code, on or after July 1, 1991, shall be open to inspection one year after their effective dates.

(B) If a contract that is entered into prior to July 1, 1991, is amended on or after July 1, 1991, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after the effective date of the amendment.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (3).

(w) (1) Records of the Managed Risk Medical Insurance Board related to activities governed by Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, on or after January 1, 1993, shall be open to inspection one year after they have been fully executed.

(3) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (2).

(x) Financial data contained in applications for registration, or registration renewal, as a service contractor filed with the Director of Consumer Affairs pursuant to Chapter 20 (commencing with Section 9800) of Division 3 of the Business and Professions Code, for the purpose of establishing the service contractor's net worth, or financial data regarding the funded accounts held in escrow for service contracts held in force in this state by a service contractor.

(y) (1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, and that reveal any of the following:

(A) The deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, entities with which the board is considering a contract, or entities with which the board is considering or enters into any other arrangement under which the board provides, receives, or arranges services or reimbursement.

(B) The impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, on or after January 1, 1998, shall be open to inspection one year after their effective dates.

(B) If a contract entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the effective date of the amendment.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to paragraph (2) or (3).

(5) The exemption from disclosure provided pursuant to this subdivision for the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff shall also apply to the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of applicants pursuant to Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code.

(z) Records obtained pursuant to paragraph (2) of subdivision (f) of Section 2891.1 of the Public Utilities Code.

(aa) A document prepared by or for a state or local agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session.

(ab) Critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the California Emergency Management Agency for use by that office, including the identity of the person who or entity that voluntarily submitted the information. As used in this subdivision, "voluntarily submitted" means submitted in the absence of the office exercising any legal authority to compel access to or submission of critical infrastructure information. This subdivision shall not affect the status of information in the possession of any other state or local governmental agency.

(ac) All information provided to the Secretary of State by a person for the purpose of registration in the Advance Health Care Directive Registry, except that those records shall be released at the request of a health care provider, a public guardian, or the registrant's legal representative.

(d) The following records of the State Compensation Insurance Fund:

(1) Records related to claims pursuant to Chapter 1 (commencing with Section 3200) of Division 4 of the Labor Code, to the extent that confidential medical information or other individually identifiable information would be disclosed.

(2) Records related to the discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the fund, and any related deliberations.

(3) Records related to the impressions, opinions, recommendations, meeting minutes of meetings or sessions that are lawfully closed to the public, research, work product, theories, or strategy of the fund or its staff, on the development of rates, contracting strategy, underwriting, or competitive strategy pursuant to the powers granted to the fund in Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code.

(4) Records obtained to provide workers' compensation insurance under Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code, including, but not limited to, any medical claims information, policyholder information provided that nothing in this paragraph shall be interpreted to prevent an insurance agent or broker from obtaining proprietary information or other information authorized by law to be obtained by the agent or broker, and information on rates, pricing, and claims handling received from brokers.

(5) (A) Records that are trade secrets pursuant to Section 6276.44, or Article 11 (commencing with Section 1060) of Chapter 4 of Division 8 of the Evidence Code, including without limitation, instructions, advice, or training provided by the State Compensation Insurance Fund to its board members, officers, and employees regarding the fund's special investigation unit, internal audit unit, and informational security, marketing, rating, pricing, underwriting, claims handling, audits, and collections.

(B) Notwithstanding subparagraph (A), the portions of records containing trade secrets shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

(6) (A) Internal audits containing proprietary information and the following records that are related to an internal audit:

(i) Personal papers and correspondence of any person providing assistance to the fund when that person has requested in writing that his or her papers and correspondence be kept private and confidential. Those papers and correspondence shall become public records if the written request is withdrawn, or upon order of the fund.

(ii) Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed or an internal audit that contains proprietary information.

(B) Notwithstanding subparagraph (A), the portions of records containing proprietary information, or any information specified in subparagraph (A) shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

(7) (A) Except as provided in subparagraph (C), contracts entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code shall be open to inspection one year after the contract has been fully executed.

(B) If a contract entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed.

(C) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(D) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to this paragraph.

(E) This paragraph is not intended to apply to documents related to contracts with public entities that are not otherwise expressly confidential as to that public entity.

(F) For purposes of this paragraph, "fully executed" means the point in time when all of the necessary parties to the contract have signed the contract.

This section shall not prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

This section shall not prevent any health facility from disclosing to a certified bargaining agent relevant financing information pursuant to Section 8 of the National Labor Relations Act (29 U.S.C. Sec. 158).

(Amended by Stats. 2013, Ch. 352, Sec. 106. Effective September 26, 2013; Operative July 1, 2013, by Sec. 543 of Ch. 352.)

**6254.1.** (a) Except as provided in Section 6254.7, nothing in this chapter requires disclosure of records that are the residence address of any person contained in the records of the Department of Housing and Community Development, if the person has requested confidentiality of that information, in accordance with Section 18081 of the Health and Safety Code.

(b) Nothing in this chapter requires the disclosure of the residence or mailing address of any person in any record of the Department of Motor Vehicles except in accordance with Section 18082.1 of the Vehicle Code.

(c) Nothing in this chapter requires the disclosure of the results of a test undertaken pursuant to Section 12804.8 of the Vehicle Code.

(Amended by Stats. 1993, Ch. 546, Sec. 1. Effective January 1, 1994.)

**6254.2.** (a) Nothing in this chapter exempts from public disclosure the same categories of pesticide safety and efficacy information that are disclosable under paragraph (1) of subsection (d) of Section 10 of the federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136h(d)(1)), if the individual requesting the information is not an officer, employee, or agent specified in subdivision (h) and signs the affirmation specified in subdivision (h).

- (b) The Director of Pesticide Regulation, upon his or her initiative, or upon receipt of a request pursuant to this chapter for the release of data submitted and designated as a trade secret by a registrant or applicant, shall determine whether any or all of the data so submitted is a properly designated trade secret. In order to assure that the interested public has an opportunity to obtain and review pesticide safety and efficacy data and to comment prior to the expiration of the public comment period on a proposed pesticide registration, the director shall provide notice to interested persons when an application for registration enters the registration evaluation process.
- (c) If the director determines that the data is not a trade secret, the director shall notify the registrant or applicant by certified mail.
- (d) The registrant or applicant shall have 30 days after receipt of this notification to provide the director with a complete justification and statement of the grounds on which the trade secret privilege is claimed. This justification and statement shall be submitted by certified mail.
- (e) The director shall determine whether the data is protected as a trade secret within 15 days after receipt of the justification and statement or, if no justification and statement is filed, within 45 days of the original notice. The director shall notify the registrant or applicant and any party who has requested the data pursuant to this chapter of that determination by certified mail. If the director determines that the data is not protected as a trade secret, the final notice shall also specify a date, not sooner than 15 days after the date of mailing of the final notice, when the data shall be available to any person requesting information pursuant to subdivision (a).
- (f) "Trade secret" means data that is nondisclosable under paragraph (1) of subsection (d) of Section 10 of the federal Insecticide, Fungicide, and Rodenticide Act.
- (g) This section shall be operative only so long as, and to the extent that, enforcement of paragraph (1) of subsection (d) of Section 10 of the federal Insecticide, Fungicide, and Rodenticide Act has not been enjoined by federal court order, and shall become inoperative if an unappealable federal court judgment or decision becomes final that holds that paragraph invalid, to the extent of the invalidity.
- (h) The director shall not knowingly disclose information submitted to the state by an applicant or registrant pursuant to Article 4 (commencing with Section 12811) of Chapter 2 of Division 7 of the Food and Agricultural Code to any officer, employee, or agent of any business or other entity engaged in the production, sale, or distribution of pesticides in countries other than the United States or in countries in addition to the United States, or to any other person who intends to deliver this information to any foreign or multinational business or entity, unless the applicant or registrant consents to the disclosure. To implement this subdivision, the director shall require the following affirmation to be signed by the person who requests such information:

## AFFIRMATION OF STATUS

This affirmation is required by Section 6254.2 of the Government Code.

I have requested access to information submitted to the Department of Pesticide Regulation (or previously submitted to the Department of Food and Agriculture) by a pesticide applicant or registrant pursuant to the California Food and Agricultural Code. I hereby affirm all of the following statements:

- (1) I do not seek access to the information for purposes of delivering it or offering it for sale to any business or other entity, including the business or entity of which I am an officer, employee, or agent engaged in the production, sale, or distribution of pesticides in countries other than the United States or in countries in addition to the United States, or to the officers, employees, or agents of such a business or entity.
- (2) I will not purposefully deliver or negligently cause the data to be delivered to a business or entity specified in paragraph (1) or its officers, employees, or agents.

I am aware that I may be subject to criminal penalties under Section 118 of the Penal Code if I make any statement of material facts knowing that the statement is false or if I willfully conceal any material fact.

Name of Requester		Name of Requester's Organization
Signature of Requester		Address of Requester
Date	Request No.	Telephone Number of Requester
Name, Address, and Telephone Number of Requester's Client, if the requester has requested access to the information on behalf of someone other than the requester or the requester's organization listed above.		

- (i) Notwithstanding any other provision of this section, the director may disclose information submitted by an applicant or registrant to any person in connection with a public proceeding conducted under law or regulation, if the director determines that the information is needed to determine whether a pesticide, or any ingredient of any pesticide, causes unreasonable adverse effects on health or the environment.
- (j) The director shall maintain records of the names of persons to whom data is disclosed pursuant to this section and the persons or organizations they represent and shall inform the applicant or registrant of the names and the affiliation of these persons.
- (k) Section 118 of the Penal Code applies to any affirmation made pursuant to this section.

(l) Any officer or employee of the state or former officer or employee of the state who, because of this employment or official position, obtains possession of, or has access to, material which is prohibited from disclosure by this section, and who, knowing that disclosure of this material is prohibited by this section, willfully discloses the material in any manner to any person not entitled to receive it, shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000), or by imprisonment in the county jail for not more than one year, or by both fine and imprisonment.

For purposes of this subdivision, any contractor with the state who is furnished information pursuant to this section, or any employee of any contractor, shall be considered an employee of the state.

(m) This section does not prohibit any person from maintaining a civil action for wrongful disclosure of trade secrets.

(n) The director may limit an individual to one request per month pursuant to this section if the director determines that a person has made a frivolous request within the past 12-month period.

*(Amended by Stats. 1996, Ch. 435, Sec. 10. Effective January 1, 1997. Conditionally inoperative as provided in subd. (g).)*

**§254.3.** (a) The home addresses and home telephone numbers of state employees and employees of a school district or county office of education shall not be deemed to be public records and shall not be open to public inspection, except that disclosure of that information may be made as follows:

(1) To an agent, or a family member of the individual to whom the information pertains.

(2) To an officer or employee of another state agency, school district, or county office of education when necessary for the performance of its official duties.

(3) To an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of employees performing law enforcement-related functions shall not be disclosed.

(4) To an agent or employee of a health benefit plan providing health services or administering claims for health services to state, school districts, and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents.

(b) Upon written request of any employee, a state agency, school district, or county office of education shall not disclose the employee's home address or home telephone number pursuant to paragraph (3) of subdivision (a) and an agency shall remove the employee's home address and home telephone number from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee.

*(Amended by Stats. 1992, Ch. 463, Sec. 1. Effective August 10, 1992.)*

**§254.4.** (a) The home address, telephone number, e-mail address, precinct number, or other number specified by the Secretary of State for voter registration purposes, and prior registration information shown on the voter registration card for all registered voters, are confidential and shall not be disclosed to any person, except pursuant to Section 2194 of the Elections Code.

(b) For purposes of this section, "home address" means street address only, and does not include an individual's city or post office address.

(c) The California driver's license number, the California identification card number, the social security number, and any other unique identifier used by the State of California for purposes of voter identification shown on a voter registration card of a registered voter, or added to the voter registration records to comply with the requirements of the Help America Vote Act of 2002 (42 U.S.C. Sec. 15301 et seq.), are confidential and shall not be disclosed to any person.

(d) The signature of the voter that is shown on the voter registration card is confidential and shall not be disclosed to any person.

*(Amended by Stats. 2005, Ch. 726, Sec. 13. Effective January 1, 2006.)*

**§254.5.** Notwithstanding any other provisions of the law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law. For purposes of this section, "agency" includes a member, agent, officer, or employee of the agency acting within the scope of his or her membership, agency, office, or employment. This section, however, shall not apply to disclosures:

(a) Made pursuant to the Information Practices Act (commencing with Section 1798 of the Civil Code) or discovery proceedings.

(b) Made through other legal proceedings or as otherwise required by law.

(c) Within the scope of disclosure of a statute which limits disclosure of specified writings to certain purposes.

(d) Not required by law, and prohibited by formal action of an elected legislative body of the local agency which retains the writings.

(e) Made to any governmental agency which agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information. Any information obtained by the agency shall only be used for purposes which are consistent with existing law.

(f) Of records relating to a financial institution or an affiliate thereof, if the disclosures are made to the financial institution or affiliate by a state agency responsible for the regulation or supervision of the financial institution or affiliate.

(g) Of records relating to any person that is subject to the jurisdiction of the Department of Corporations, if the disclosures are made to the person that is the subject of the records for the purpose of corrective action by that person, or if a corporation, to an officer, director, or other key personnel of the corporation for the purpose of corrective action, or to any other person to the extent necessary to obtain information from that person for the purpose of an investigation by the Department of Corporations.

(h) Made by the Commissioner of Financial Institutions under Section 280, 282, 8009, or 18396 of the Financial Code.

(i) Of records relating to any person that is subject to the jurisdiction of the Department of Managed Health Care, if the disclosures

are made to the person that is the subject of the records for the purpose of corrective action by that person, or if a corporation, to an officer, director, or other key personnel of the corporation for the purpose of corrective action, or to any other person to the extent necessary to obtain information from that person for the purpose of an investigation by the Department of Managed Health Care.

(Amended by Stats. 2008, Ch. 501, Sec. 23. Effective January 1, 2009.)

**§254.6.** Whenever a city and county or a joint powers agency, pursuant to a mandatory statute or charter provision to collect private industry wage data for salary setting purposes, or a contract entered to implement that mandate, is provided this data by the federal Bureau of Labor Statistics on the basis that the identity of private industry employers shall remain confidential, the identity of the employers shall not be open to the public or be admitted as evidence in any action or special proceeding.

(Added by Stats. 1987, Ch. 1478, Sec. 1.)

**§254.7.** (a) All information, analyses, plans, or specifications that disclose the nature, extent, quantity, or degree of air contaminants or other pollution which any article, machine, equipment, or other contrivance will produce, which any air pollution control district or air quality management district, or any other state or local agency or district, requires any applicant to provide before the applicant builds, erects, alters, replaces, operates, sells, rents, or uses the article, machine, equipment, or other contrivance, are public records.

(b) All air or other pollution monitoring data, including data compiled from stationary sources, are public records.

(c) All records of notices and orders directed to the owner of any building of violations of housing or building codes, ordinances, statutes, or regulations which constitute violations of standards provided in Section 1941.1 of the Civil Code, and records of subsequent action with respect to those notices and orders, are public records.

(d) Except as otherwise provided in subdivision (e) and Chapter 3 (commencing with Section 99150) of Part 65 of the Education Code, trade secrets are not public records under this section. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

(e) Notwithstanding any other provision of law, all air pollution emission data, including those emission data which constitute trade secrets as defined in subdivision (d), are public records. Data used to calculate emission data are not emission data for the purposes of this subdivision and data which constitute trade secrets and which are used to calculate emission data are not public records.

(f) Data used to calculate the costs of obtaining emissions offsets are not public records. At the time that an air pollution control district or air quality management district issues a permit to construct to an applicant who is required to obtain offsets pursuant to district rules and regulations, data obtained from the applicant consisting of the year the offset transaction occurred, the amount of offsets purchased, by pollutant, and the total cost, by pollutant, of the offsets purchased is a public record. If an application is denied, the data shall not be a public record.

(Amended by Stats. 1992, Ch. 612, Sec. 1. Effective January 1, 1993.)

**§254.8.** Every employment contract between a state or local agency and any public official or public employee is a public record which is not subject to the provisions of Sections 6254 and 6255.

(Added by Stats. 1974, Ch. 1198.)

**§254.9.** (a) Computer software developed by a state or local agency is not itself a public record under this chapter. The agency may sell, lease, or license the software for commercial or noncommercial use.

(b) As used in this section, "computer software" includes computer mapping systems, computer programs, and computer graphics systems.

(c) This section shall not be construed to create an implied warranty on the part of the State of California or any local agency for errors, omissions, or other defects in any computer software as provided pursuant to this section.

(d) Nothing in this section is intended to affect the public record status of information merely because it is stored in a computer. Public records stored in a computer shall be disclosed as required by this chapter.

(e) Nothing in this section is intended to limit any copyright protections.

(Added by Stats. 1988, Ch. 447, Sec. 1.)

**§254.10.** Nothing in this chapter requires disclosure of records that relate to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State Historical Resources Commission, the State Lands Commission, the Native American Heritage Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American tribe and a state or local agency.

(Amended by Stats. 2005, Ch. 670, Sec. 2. Effective October 7, 2005.)

**§254.11.** Nothing in this chapter requires the disclosure of records that relate to volatile organic compounds or chemical substances information received or compiled by an air pollution control officer pursuant to Section 42303.2 of the Health and Safety Code.

(Added by Stats. 1991, Ch. 902, Sec. 1.)

**§254.12.** Any information reported to the North American Securities Administrators Association/National Association of Securities Dealers' Central Registration Depository and compiled as disciplinary records which are made available to the Department of

Corporations through a computer system, shall constitute a public record. Notwithstanding any other provision of law, the Department of Corporations may disclose that information and the current license status and the year of issuance of the license of a broker-dealer upon written or oral request pursuant to Section 25247 of the Corporations Code.

(Added by Stats. 1993, Ch. 469, Sec. 12. Effective January 1, 1994.)

**6254.13.** Notwithstanding Section 6254, upon the request of any Member of the Legislature or upon request of the Governor or his or her designee, test questions or materials that would be used to administer an examination and are provided by the State Department of Education and administered as part of a statewide testing program of pupils enrolled in the public schools shall be disclosed to the requester. These questions or materials may not include an individual examination that has been administered to a pupil and scored. The requester may not take physical possession of the questions or materials, but may view the questions or materials at a location selected by the department. Upon viewing this information, the requester shall keep the materials that he or she has seen confidential.

(Added by Stats. 1995, Ch. 777, Sec. 3. Effective January 1, 1996.)

**6254.14.** (a) (1) Except as provided in Sections 6254 and 6254.7, nothing in this chapter shall be construed to require disclosure of records of the Department of Corrections and Rehabilitation that relate to health care services contract negotiations, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations, including, but not limited to, records related to those negotiations such as meeting minutes, research, work product, theories, or strategy of the department, or its staff, or members of the California Medical Assistance Commission, or its staff, who act in consultation with, or on behalf of, the department.

(2) Except for the portion of a contract that contains the rates of payment, contracts for health services entered into by the Department of Corrections and Rehabilitation or the California Medical Assistance Commission on or after July 1, 1993, shall be open to inspection one year after they are fully executed. In the event that a contract for health services that is entered into prior to July 1, 1993, is amended on or after July 1, 1993, the amendment, except for any portion containing rates of payment, shall be open to inspection one year after it is fully executed.

(3) Three years after a contract or amendment is open to inspection under this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, including, but not limited to, Section 1060 of the Evidence Code, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee, the California State Auditor's Office, and the Legislative Analyst's Office. The Joint Legislative Audit Committee, the California State Auditor's Office, and the Legislative Analyst's Office shall maintain the confidentiality of the contracts and amendments until the contract or amendment is fully open to inspection by the public.

(5) It is the intent of the Legislature that confidentiality of health care provider contracts, and of the contracting process as provided in this subdivision, is intended to protect the competitive nature of the negotiation process, and shall not affect public access to other information relating to the delivery of health care services.

(b) The inspection authority and confidentiality requirements established in subdivisions (a), (v), and (y) of Section 6254 for the Legislative Audit Committee shall also apply to the California State Auditor's Office and the Legislative Analyst's Office.

(Amended by Stats. 2012, Ch. 261, Sec. 3. Effective January 1, 2013.)

**6254.15.** Nothing in this chapter shall be construed to require the disclosure of records that are any of the following: corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California. Except as provided below, incentives offered by state or local government agencies, if any, shall be disclosed upon communication to the agency or the public of a decision to stay, locate, relocate, or expand, by a company, or upon application by that company to a governmental agency for a general plan amendment, rezone, use permit, building permit, or any other permit, whichever occurs first.

The agency shall delete, prior to disclosure to the public, information that is exempt pursuant to this section from any record describing state or local incentives offered by an agency to a private business to retain, locate, relocate, or expand the business within California.

(Added by Stats. 1995, Ch. 732, Sec. 1. Effective January 1, 1996.)

**6254.16.** Nothing in this chapter shall be construed to require the disclosure of the name, credit history, utility usage data, home address, or telephone number of utility customers of local agencies, except that disclosure of name, utility usage data, and the home address of utility customers of local agencies shall be made available upon request as follows:

(a) To an agent or authorized family member of the person to whom the information pertains.

(b) To an officer or employee of another governmental agency when necessary for the performance of its official duties.

(c) Upon court order or the request of a law enforcement agency relative to an ongoing investigation.

(d) Upon determination by the local agency that the utility customer who is the subject of the request has used utility services in a manner inconsistent with applicable local utility usage policies.

(e) Upon determination by the local agency that the utility customer who is the subject of the request is an elected or appointed official with authority to determine the utility usage policies of the local agency, provided that the home address of an appointed official shall not be disclosed without his or her consent.

(f) Upon determination by the local agency that the public interest in disclosure of the information clearly outweighs the public interest in nondisclosure.

(Added by Stats. 1997, Ch. 276, Sec. 1. Effective January 1, 1998.)

**6254.17.** (a) Nothing in this chapter shall be construed to require disclosure of records of the California Victim Compensation and Government Claims Board that relate to a request for assistance under Article 1 (commencing with Section 13950) of Chapter 5 of Part 4 of Division 3 of Title 2.

(b) This section shall not apply to a disclosure of the following information, if no information is disclosed that connects the information to a specific victim, derivative victim, or applicant under Article 1 (commencing with Section 13950) of Chapter 5 of Part 4 of Division 3 of Title 2:

- (1) The amount of money paid to a specific provider of services.
- (2) Summary data concerning the types of crimes for which assistance is provided.

(Amended by Stats. 2004, Ch. 183, Sec. 135. Effective January 1, 2005.)

**6254.18.** (a) Nothing in this chapter shall be construed to require disclosure of any personal information received, collected, or compiled by a public agency regarding the employees, volunteers, board members, owners, partners, officers, or contractors of a reproductive health services facility who have notified the public agency pursuant to subdivision (d) if the personal information is contained in a document that relates to the facility.

(b) For purposes of this section, the following terms have the following meanings:

(1) "Contractor" means an individual or entity that contracts with a reproductive health services facility for services related to patient care.

(2) "Personal information" means the following information related to an individual that is maintained by a public agency: social security number, physical description, home address, home telephone number, statements of personal worth or personal financial data filed pursuant to subdivision (n) of Section 6254, personal medical history, employment history, electronic mail address, and information that reveals any electronic network location or identity.

(3) "Public agency" means all of the following:

- (A) The State Department of Health Care Services.
- (B) The Department of Consumer Affairs.
- (C) The Department of Managed Health Care.
- (D) The State Department of Public Health.

(4) "Reproductive health services facility" means the office of a licensed physician and surgeon whose specialty is family practice, obstetrics, or gynecology, or a licensed clinic, where at least 50 percent of the patients of the physician or the clinic are provided with family planning or abortion services.

(c) Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to obtain access to employment history information pursuant to Sections 6258 and 6259. If the court finds, based on the facts of a particular case, that the public interest served by disclosure of employment history information clearly outweighs the public interest served by not disclosing the information, the court shall order the officer or person charged with withholding the information to disclose employment history information or show cause why he or she should not do so pursuant to Section 6259.

(d) In order for this section to apply to an individual who is an employee, volunteer, board member, officer, or contractor of a reproductive health services facility, the individual shall notify the public agency to which his or her personal information is being submitted or has been submitted that he or she falls within the application of this section. The reproductive health services facility shall retain a copy of all notifications submitted pursuant to this section. This notification shall be valid if it complies with all of the following:

- (1) Is on the official letterhead of the facility.
- (2) Is clearly separate from any other language present on the same page and is executed by a signature that serves no other purpose than to execute the notification.
- (3) Is signed and dated by both of the following:
  - (A) The individual whose information is being submitted.
  - (B) The executive officer or his or her designee of the reproductive health services facility.

(e) The privacy protections for personal information authorized pursuant to this section shall be effective from the time of notification pursuant to subdivision (d) until either one of the following occurs:

- (1) Six months after the date of separation from a reproductive health services facility for an individual who has served for not more than one year as an employee, contractor, volunteer, board member, or officer of the reproductive health services facility.
- (2) One year after the date of separation from a reproductive health services facility for an individual who has served for more than one year as an employee, contractor, volunteer, board member, or officer of the reproductive health services facility.
- (f) Within 90 days of separation of an employee, contractor, volunteer, board member, or officer of the reproductive health services facility who has provided notice to a public agency pursuant to subdivision (c), the facility shall provide notice of the separation to the relevant agency or agencies.

(g) Nothing in this section shall prevent the disclosure by a government agency of data regarding age, race, ethnicity, national origin, or gender of individuals whose personal information is protected pursuant to this section, so long as the data contains no individually identifiable information.

(Amended by Stats. 2006, Ch. 241, Sec. 3. Effective January 1, 2007. Operative July 1, 2007, by Sec. 37 of Ch. 241.)

Nothing in this chapter shall be construed to require the disclosure of an information security record of a public agency, if, **6754.19** on the facts of the particular case, disclosure of that record would reveal vulnerabilities to, or otherwise increase the potential for an attack on, an information technology system of a public agency. Nothing in this section shall be construed to limit public disclosure of records stored within an information technology system of a public agency that are not otherwise exempt from disclosure pursuant to this chapter or any other provision of law.

(Added by Stats. 2010, Ch. 205, Sec. 1. Effective January 1, 2011.)

**6754.20** Nothing in this chapter shall be construed to require the disclosure of records that relate to electronically collected personal information, as defined by Section 11015.5, received, collected, or compiled by a state agency.

(Added by Stats. 1998, Ch. 429, Sec. 3. Effective January 1, 1999.)

**6754.21** (a) No state or local agency shall post the home address or telephone number of any elected or appointed official on the Internet without first obtaining the written permission of that individual.

(b) No person shall knowingly post the home address or telephone number of any elected or appointed official, or of the official's residing spouse or child, on the Internet knowing that person is an elected or appointed official and intending to cause imminent great bodily harm that is likely to occur or threatening to cause imminent great bodily harm to that individual. A violation of this subdivision is a misdemeanor. A violation of this subdivision that leads to the bodily injury of the official, or his or her residing spouse or child, is a misdemeanor or a felony.

(c) (1) (A) No person, business, or association shall publicly post or publicly display on the Internet the home address or telephone number of any elected or appointed official if that official has made a written demand of that person, business, or association to not disclose his or her home address or telephone number.

(B) A written demand made under this paragraph by a state constitutional officer, a mayor, or a Member of the Legislature, a city council, or a board of supervisors shall include a statement describing a threat or fear for the safety of that official or of any person residing at the official's home address.

(C) A written demand made under this paragraph by an elected official shall be effective for four years, regardless of whether or not the official's term has expired prior to the end of the four-year period.

(D) (i) A person, business, or association that receives the written demand of an elected or appointed official pursuant to this paragraph shall remove the official's home address or telephone number from public display on the Internet, including information provided to cellular telephone applications, within 48 hours of delivery of the written demand, and shall continue to ensure that this information is not reposted on the same Internet Web site, subsidiary site, or any other Internet Web site maintained by the recipient of the written demand.

(ii) After receiving the elected or appointed official's written demand, the person, business, or association shall not transfer the appointed or elected official's home address or telephone number to any other person, business, or association through any other medium.

(iii) Clause (ii) shall not be deemed to prohibit a telephone corporation, as defined in Section 234 of the Public Utilities Code, or its affiliate, from transferring the elected or appointed official's home address or telephone number to any person, business, or association, if the transfer is authorized by federal or state law, regulation, order, or tariff, or necessary in the event of an emergency, or to collect a debt owed by the elected or appointed official to the telephone corporation or its affiliate.

(E) For purposes of this paragraph, "publicly post" or "publicly display" means to intentionally communicate or otherwise make available to the general public.

(2) An official whose home address or telephone number is made public as a result of a violation of paragraph (1) may bring an action seeking injunctive or declarative relief in any court of competent jurisdiction. If a court finds that a violation has occurred, it may grant injunctive or declarative relief and shall award the official court costs and reasonable attorney's fees. A fine not exceeding one thousand dollars (\$1,000) may be imposed for a violation of the court's order for an injunction or declarative relief obtained pursuant to this paragraph.

(3) An elected or appointed official may designate in writing the official's employer, a related governmental entity, or any voluntary professional association of similar officials to act, on behalf of that official, as that official's agent with regard to making a written demand pursuant to this section. A written demand made by an agent pursuant to this paragraph shall include a statement describing a threat or fear for the safety of that official or of any person residing at the official's home address.

(d) (1) No person, business, or association shall solicit, sell, or trade on the Internet the home address or telephone number of an elected or appointed official with the intent to cause imminent great bodily harm to the official or to any person residing at the official's home address.

(2) Notwithstanding any other law, an official whose home address or telephone number is solicited, sold, or traded in violation of paragraph (1) may bring an action in any court of competent jurisdiction. If a jury or court finds that a violation has occurred, it shall award damages to that official in an amount up to a maximum of three times the actual damages but in no case less than four thousand dollars (\$4,000).

(e) An interactive computer service or access software provider, as defined in Section 230(f) of Title 47 of the United States Code, shall not be liable under this section unless the service or provider intends to abet or cause imminent great bodily harm that is likely to occur or threatens to cause imminent great bodily harm to an elected or appointed official.

(f) For purposes of this section, "elected or appointed official" includes, but is not limited to, all of the following:

- (1) State constitutional officers.
- (2) Members of the Legislature.
- (3) Judges and court commissioners.

- (4) District attorneys.
  - (5) Public defenders.
  - (6) Members of a city council.
  - (7) Members of a board of supervisors.
  - (8) Appointees of the Governor.
  - (9) Appointees of the Legislature.
  - (10) Mayors.
  - (11) City attorneys.
  - (12) Police chiefs and sheriffs.
  - (13) A public safety official, as defined in Section 6254.24.
  - (14) State administrative law judges.
  - (15) Federal judges and federal defenders.
  - (16) Members of the United States Congress and appointees of the President.
- (g) Nothing in this section is intended to preclude punishment instead under Sections 69, 76, or 422 of the Penal Code, or any other provision of law.

(Amended by Stats. 2010, Ch. 194, Sec. 1. Effective January 1, 2011.)

**6254.22.** Nothing in this chapter or any other provision of law shall require the disclosure of records of a health plan that is licensed pursuant to the Kno x-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code) and that is governed by a county board of supervisors, whether paper records, records maintained in the management information system, or records in any other form, that relate to provider rate or payment determinations, allocation or distribution methodologies for provider payments, formulae or calculations for these payments, and contract negotiations with providers of health care for alternative rates for a period of three years after the contract is fully executed. The transmission of the records, or the information contained therein in an alternative form, to the board of supervisors shall not constitute a waiver of exemption from disclosure, and the records and information once transmitted to the board of supervisors shall be subject to this same exemption. The provisions of this section shall not prevent access to any records by the Joint Legislative Audit Committee in the exercise of its powers pursuant to Article 1 (commencing with Section 10500) of Chapter 4 of Part 2 of Division 2 of Title 2. The provisions of this section also shall not prevent access to any records by the Department of Corporations in the exercise of its powers pursuant to Article 1 (commencing with Section 1340) of Chapter 2.2 of Division 2 of the Health and Safety Code.

(Added by Stats. 1999, Ch. 769, Sec. 1. Effective January 1, 2000.)

**6254.23.** Nothing in this chapter or any other provision of law shall require the disclosure of a risk assessment or railroad infrastructure protection program filed with the Public Utilities Commission, the Director of Homeland Security, and the Office of Emergency Services pursuant to Article 7.3 (commencing with Section 7665) of Chapter 1 of Division 4 of the Public Utilities Code.

(Amended by Stats. 2013, Ch. 352, Sec. 107. Effective September 26, 2013. Operative July 1, 2013, by Sec. 543 of Ch. 352.)

**6254.24.** As used in this chapter, "public safety official" means the following parties, whether active or retired:

- (a) A peace officer as defined in Sections 830 to 830.65, inclusive, of the Penal Code, or a person who is not a peace officer, but may exercise the powers of arrest during the course and within the scope of their employment pursuant to Section 830.7 of the Penal Code.
- (b) A public officer or other person listed in Sections 1808.2 and 1808.6 of the Vehicle Code.
- (c) An "elected or appointed official" as defined in subdivision (f) of Section 6254.21.
- (d) An attorney employed by the Department of Justice, the State Public Defender, or a county office of the district attorney or public defender, the United States Attorney, or the Federal Public Defender.
- (e) A city attorney and an attorney who represent cities in criminal matters.
- (f) An employee of the Department of Corrections and Rehabilitation who supervises inmates or is required to have a prisoner in his or her care or custody.
- (g) A sworn or nonsworn employee who supervises inmates in a city police department, a county sheriff's office, the Department of the California Highway Patrol, federal, state, or a local detention facility, and a local juvenile hall, camp, ranch, or home, and a probation officer as defined in Section 830.5 of the Penal Code.
- (h) A federal prosecutor, a federal criminal investigator, and a National Park Service Ranger working in California.
- (i) The surviving spouse or child of a peace officer defined in Section 830 of the Penal Code, if the peace officer died in the line of duty.
- (j) State and federal judges and court commissioners.
- (k) An employee of the Attorney General, a district attorney, or a public defender who submits verification from the Attorney General, district attorney, or public defender that the employee represents the Attorney General, district attorney, or public defender in matters that routinely place that employee in personal contact with persons under investigation for, charged with, or convicted of, committing criminal acts.
- (l) A nonsworn employee of the Department of Justice or a police department or sheriff's office that, in the course of his or her employment, is responsible for collecting, documenting, and preserving physical evidence at crime scenes, testifying in court as an

expert witness, and other technical duties, and a nons sworn employee that, in the course of his or her employment, performs a variety of standardized and advanced laboratory procedures in the examination of physical crime evidence, determines their results, and provides expert testimony in court.

(Amended by Stats. 2010, Ch. 194, Sec. 2. Effective January 1, 2011.)

**§254.25.** Nothing in this chapter or any other provision of law shall require the disclosure of a memorandum submitted to a state body or to the legislative body of a local agency by its legal counsel pursuant to subdivision (q) of Section 11126 or Section 54956.9 until the pending litigation has been finally adjudicated or otherwise settled. The memorandum shall be protected by the attorney work-product privilege until the pending litigation has been finally adjudicated or otherwise settled.

(Amended by Stats. 1987, Ch. 1320, Sec. 1.)

**§254.26.** (a) Notwithstanding any provision of this chapter or other law, the following records regarding alternative investments in which public investment funds invest shall not be subject to disclosure pursuant to this chapter, unless the information has already been publicly released by the keeper of the information:

- (1) Due diligence materials that are proprietary to the public investment fund or the alternative investment vehicle.
- (2) Quarterly and annual financial statements of alternative investment vehicles.
- (3) Meeting materials of alternative investment vehicles.
- (4) Records containing information regarding the portfolio positions in which alternative investment funds invest.
- (5) Capital call and distribution notices.
- (6) Alternative investment agreements and all related documents.

(b) Notwithstanding subdivision (a), the following information contained in records described in subdivision (a) regarding alternative investments in which public investment funds invest shall be subject to disclosure pursuant to this chapter and shall not be considered a trade secret exempt from disclosure:

- (1) The name, address, and vintage year of each alternative investment vehicle.
  - (2) The dollar amount of the commitment made to each alternative investment vehicle by the public investment fund since inception.
  - (3) The dollar amount of cash contributions made by the public investment fund to each alternative investment vehicle since inception.
  - (4) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund from each alternative investment vehicle.
  - (5) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund plus remaining value of partnership assets attributable to the public investment fund's investment in each alternative investment vehicle.
  - (6) The net internal rate of return of each alternative investment vehicle since inception.
  - (7) The investment multiple of each alternative investment vehicle since inception.
  - (8) The dollar amount of the total management fees and costs paid on an annual fiscal yearend basis, by the public investment fund to each alternative investment vehicle.
  - (9) The dollar amount of cash profit received by public investment funds from each alternative investment vehicle on a fiscal year-end basis.
- (c) For purposes of this section, the following definitions shall apply:
- (1) "Alternative investment" means an investment in a private equity fund, venture fund, hedge fund, or absolute return fund.
  - (2) "Alternative investment vehicle" means the limited partnership, limited liability company, or similar legal structure through which the public investment fund invests in portfolio companies.
  - (3) "Portfolio positions" means individual portfolio investments made by the alternative investment vehicles.
  - (4) "Public investment fund" means any public pension or retirement system, and any public endowment or foundation.

(Amended by Stats. 2006, Ch. 538, Sec. 233. Effective January 1, 2007.)

**§254.27.** Nothing in this chapter shall be construed to require the disclosure by a county recorder of any "official record" if a "public record" version of that record is available pursuant to Article 3.5 (commencing with Section 27300) of Chapter 6 of Part 3 of Division 2 of Title 3.

(Added by Stats. 2007, Ch. 627, Sec. 4. Effective January 1, 2008.)

**§254.28.** Nothing in this chapter shall be construed to require the disclosure by a filing office of any "official record" if a "public record" version of that record is available pursuant to Section 9526.5 of the Commercial Code.

(Added by Stats. 2007, Ch. 627, Sec. 5. Effective January 1, 2008.)

**§254.29.** (a) It is the intent of the Legislature that, in order to protect against the risk of identity theft, local agencies shall redact social security numbers from records before disclosing them to the public pursuant to this chapter.

(b) Nothing in this chapter shall be construed to require a local agency to disclose a social security number.

(c) This section shall not apply to records maintained by a county recorder.

(Added by Stats. 2007, Ch. 627, Sec. 6. Effective January 1, 2008.)

**§254.30.** A state or local law enforcement agency shall not require a victim of an incident, or an authorized representative thereof, to show proof of the victim's legal presence in the United States in order to obtain the information required to be disclosed by that law enforcement agency pursuant to subdivision (f) of Section 6254. However, if, for identification purposes, a state or local law enforcement agency requires identification in order for a victim of an incident, or an authorized representative thereof, to obtain that information, the agency shall, at a minimum, accept a current driver's license or identification card issued by any state in the United States, a current passport issued by the United States or a foreign government with which the United States has a diplomatic relationship, or a current Matricula Consular card.

(Added by Stats. 2013, Ch. 272, Sec. 1. Effective January 1, 2014.)

**§255.** (a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

(b) A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing.

(Amended by Stats. 2000, Ch. 982, Sec. 3. Effective January 1, 2001.)

**§257.5.** This chapter does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure.

(Added by Stats. 1998, Ch. 1049, Sec. 1. Effective January 1, 1999.)

**§258.** Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.

(Amended by Stats. 1990, Ch. 908, Sec. 1.)

**§259.** (a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow.

(b) If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, he or she shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he or she shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure.

(c) In an action filed on or after January 1, 1991, an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ. Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days. A stay of an order or judgment shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits. Any person who fails to obey the order of the court shall be held to show cause why he or she is not in contempt of court.

(d) The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

(Amended by Stats. 1993, Ch. 926, Sec. 10. Effective January 1, 1994.)

**§260.** The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state, nor to limit or impair any rights of discovery in a criminal case.

(Amended by Stats. 1976, Ch. 314.)

**§261.** Notwithstanding Section 6252, an itemized statement of the total expenditures and disbursement of any agency provided for in Article VI of the California Constitution shall be open for inspection.

(Added by Stats. 1975, Ch. 1246.)

**§262.** The exemption of records of complaints to, or investigations conducted by, any state or local agency for licensing purposes under subdivision (f) of Section 6254 shall not apply when a request for inspection of such records is made by a district attorney.

(Added by Stats. 1979, Ch. 601.)

**§263.** A state or local agency shall allow an inspection or copying of any public record or class of public records not exempted by this chapter when requested by a district attorney.

(Added by Stats. 1979, Ch. 601.)

**6264.** The district attorney may petition a court of competent jurisdiction to require a state or local agency to allow him to inspect or receive a copy of any public record or class of public records not exempted by this chapter when the agency fails or refuses to allow inspection or copying within 10 working days of a request. The court may require a public agency to permit inspection or copying by the district attorney unless the public interest or good cause in withholding such records clearly outweighs the public interest in disclosure.

(Added by Stats. 1979, Ch. 601.)

**6265.** Disclosure of records to a district attorney under the provisions of this chapter shall effect no change in the status of the records under any other provision of law.

(Added by Stats. 1979, Ch. 601.)

**6267.** All patron use records of any library which is in whole or in part supported by public funds shall remain confidential and shall not be disclosed by a public agency, or private actor that maintains or stores patron use records on behalf of a public agency, to any person, local agency, or state agency except as follows:

- (a) By a person acting within the scope of his or her duties within the administration of the library.
- (b) By a person authorized, in writing, by the individual to whom the records pertain, to inspect the records.
- (c) By order of the appropriate superior court.

As used in this section, the term "patron use records" includes the following:

- (1) Any written or electronic record, that is used to identify the patron, including, but not limited to, a patron's name, address, telephone number, or e-mail address, that a library patron provides in order to become eligible to borrow or use books and other materials.
- (2) Any written record or electronic transaction that identifies a patron's borrowing information or use of library information resources, including, but not limited to, database search records, borrowing records, class records, and any other personally identifiable uses of library resources information requests, or inquiries.

This section shall not apply to statistical reports of patron use nor to records of fines collected by the library.

(Amended by Stats. 2011, Ch. 80, Sec. 1. Effective January 1, 2012.)

**6268.** Public records, as defined in Section 6252, in the custody or control of the Governor when he or she leaves office, either voluntarily or involuntarily, shall, as soon as is practical, be transferred to the State Archives. Notwithstanding any other provision of law, the Governor, by written instrument, the terms of which shall be made public, may restrict public access to any of the transferred public records, or any other writings he or she may transfer, which have not already been made accessible to the public. With respect to public records, public access, as otherwise provided for by this chapter, shall not be restricted for a period greater than 50 years or the death of the Governor, whichever is later, nor shall there be any restriction whatsoever with respect to enrolled bill files, press releases, speech files, or writings relating to applications for clemency or extradition in cases which have been closed for a period of at least 25 years. Subject to any restrictions permitted by this section, the Secretary of State, as custodian of the State Archives, shall make all such public records and other writings available to the public as otherwise provided for in this chapter. Except as to enrolled bill files, press releases, speech files, or writings relating to applications for clemency or extradition, this section shall not apply to public records or other writings in the direct custody or control of any Governor who held office between 1974 and 1988 at the time of leaving office, except to the extent that that Governor may voluntarily transfer those records or other writings to the State Archives.

Notwithstanding any other provision of law, the public records and other writings of any Governor who held office between 1974 and 1988 may be transferred to any educational or research institution in California provided that with respect to public records, public access, as otherwise provided for by this chapter, shall not be restricted for a period greater than 50 years or the death of the Governor, whichever is later. No records or writings may be transferred pursuant to this paragraph unless the institution receiving them agrees to maintain, and does maintain, the materials according to commonly accepted archival standards. No public records transferred shall be destroyed by that institution without first receiving the written approval of the Secretary of State, as custodian of the State Archives, who may require that the records be placed in the State Archives rather than being destroyed. An institution receiving those records or writings shall allow the Secretary of State, as custodian of the State Archives, to copy, at state expense, and to make available to the public, any and all public records, and inventories, indices, or finding aids relating to those records, which the institution makes available to the public generally. Copies of those records in the custody of the State Archives shall be given the same legal effect as is given to the originals.

(Added by Stats. 1988, Ch. 503, Sec. 1.)

**6270.** (a) Notwithstanding any other provision of law, no state or local agency shall sell, exchange, furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a private entity in a manner that prevents a state or local agency from providing the record directly pursuant to this chapter. Nothing in this section requires a state or local agency to use the State Printer to print public records. Nothing in this section prevents the destruction of records pursuant to law.

(b) This section shall not apply to contracts entered into prior to January 1, 1996, between the County of Santa Clara and a private entity for the provision of public records subject to disclosure under this chapter.

(Added by Stats. 1995, Ch. 108, Sec. 1. Effective January 1, 1996.)

ARTICLE 2. Other Exemptions from Disclosure [6275 - 6276.48] (Article 2 added by Stats. 1998, Ch. 620, Sec. 11.)

**6275.** It is the intent of the Legislature to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act. It is the intent of the Legislature that, after January 1, 1999, each addition or amendment to a statute that exempts any information contained in a public record from disclosure pursuant to subdivision (k) of Section 6254 shall be listed and described in this article pursuant to a bill authorized by a standing committee of the Legislature to be introduced during the first year of each session of the Legislature. The statutes and constitutional provisions listed in this article may operate to exempt certain records, or portions thereof, from disclosure. The statutes and constitutional provisions listed and described may not be inclusive of all exemptions. The listing of a statute or constitutional provision in this article does not itself create an exemption. Requesters of public records and public agencies are cautioned to review the applicable statute or constitutional provision to determine the extent to which it, in light of the circumstances surrounding the request, exempts public records from disclosure.

(Amended by Stats. 2012, Ch. 697, Sec. 2. Effective January 1, 2013.)

**6275.** Records or information not required to be disclosed pursuant to subdivision (k) of Section 6254 may include, but shall not be limited to, records or information identified in statutes listed in this article.

(Added by Stats. 1998, Ch. 620, Sec. 11. Effective January 1, 1999.)

**6276.01.** Crime victims, confidential information or records, The Victims' Bill of Rights Act of 2008: Marsy's Law, Section 28 of Article I of the California Constitution.

(Added by Stats. 2012, Ch. 697, Sec. 3. Effective January 1, 2013.)

**6276.02.** Acquired Immune Deficiency Syndrome, blood test results, written authorization not necessary for disclosure, Section 121010, Health and Safety Code.

Acquired Immune Deficiency Syndrome, blood test subject, compelling identity of, Section 120975, Health and Safety Code.

Acquired Immune Deficiency Syndrome, confidentiality of personal data of patients in State Department of Public Health programs, Section 120820, Health and Safety Code.

Acquired Immune Deficiency Syndrome, confidentiality of research records, Sections 121090, 121095, 121115, and 121120, Health and Safety Code.

Acquired Immune Deficiency Syndrome, confidentiality of vaccine volunteers, Section 121280, Health and Safety Code.

Acquired Immune Deficiency Syndrome, confidentiality of information obtained in prevention programs at correctional facilities and law enforcement agencies, Sections 7552 and 7554, Penal Code.

Acquired Immune Deficiency Syndrome, confidentiality of test results of person convicted of prostitution, Section 1202.6, Penal Code.

Acquired Immune Deficiency Syndrome, disclosure of results of HIV test, penalties, Section 120980, Health and Safety Code.

Acquired Immune Deficiency Syndrome, personal information, insurers tests, confidentiality of, Section 799, Insurance Code.

Acquired Immune Deficiency Syndrome, public safety and testing disclosure, Sections 121065 and 121070, Health and Safety Code.

Acquired Immune Deficiency Syndrome Research and Confidentiality Act, production or discovery of records for use in criminal or civil proceedings against subject prohibited, Section 121100, Health and Safety Code.

Acquired Immune Deficiency Syndrome Public Health Records Confidentiality Act, personally identifying information confidentiality, Section 121025, Health and Safety Code.

Acquired Immune Deficiency Syndrome, test of criminal defendant pursuant to search warrant requested by victim, confidentiality of, Section 1524.1, Penal Code.

Acquired Immune Deficiency Syndrome, test results, disclosure to patient's spouse and others, Section 121015, Health and Safety Code.

Acquired Immune Deficiency Syndrome, test of person under Youth Authority, disclosure of results, Section 1768.9, Welfare and Institutions Code.

Acquired Immune Deficiency Syndrome Research and Confidentiality Act, financial audits or program evaluations, Section 121085, Health and Safety Code.

Acquired Immune Deficiency Syndrome Research and Confidentiality Act, violations, Section 121100, Health and Safety Code.

Acquired Immune Deficiency Syndrome Research and Confidentiality Act, personally identifying research records not to be disclosed, Section 121075, Health and Safety Code.

Acquired Immune Deficiency Syndrome Research and Confidentiality Act, permittee disclosure, Section 121080, Health and Safety Code.

Administrative procedure, adjudicatory hearings, interpreters, Section 11513.

Adoption records, confidentiality of, Section 102730, Health and Safety Code.

Advance Health Care Directive Registry, exemption from disclosure for registration information provided to the Secretary of State, subdivision (ac), Section 6254.

(Amended by Stats. 2009, Ch. 584, Sec. 2. Effective January 1, 2010.)

**6276.04.** Aeronautics Act, reports of investigations and hearings, Section 21693, Public Utilities Code.

Agricultural producers marketing, access to records, Section 59616, Food and Agricultural Code.

Aiding disabled voters, Section 14282, Elections Code.

Air pollution data, confidentiality of trade secrets, Section 6254.7, and Sections 42303.2 and 43206, Health and Safety Code.

Air toxics emissions inventory plans, protection of trade secrets, Section 44346, Health and Safety Code.

Alcohol and drug abuse records and records of communicable diseases, confidentiality of, Section 123125, Health and Safety Code.

Alcoholic beverage licensees, confidentiality of corporate proprietary information, Section 25205, Business and Professions Code.

Ambulatory Surgery Data Record, confidentiality of identifying information, Section 128737, Health and Safety Code.

Aplary registration information, confidentiality of, Section 29041, Food and Agricultural Code.

Archaeological site information and reports maintained by state and local agencies, disclosure not required, Section 6254.10.

Arrest not resulting in conviction, disclosure or use of records, Sections 432.7 and 432.8, Labor Code.

Arsonists, registered, confidentiality of certain information, Section 457.1, Penal Code.

Artificial Insemination, donor not natural father, confidentiality of records, Section 7613, Family Code.

Assessor's records, confidentiality of information in, Section 408, Revenue and Taxation Code.

Assessor's records, confidentiality of information in, Section 451, Revenue and Taxation Code.

Assessor's records, display of documents relating to business affairs or property of another, Section 408.2, Revenue and Taxation Code.

Assigned risk plans, rejected applicants, confidentiality of information, Section 11624, Insurance Code.

Attorney applicant, investigation by State Bar, confidentiality of, Section 6060.2, Business and Professions Code.

Attorney-client confidential communication, Section 6068, Business and Professions Code, and Sections 952 and 954, Evidence Code.

Attorney, disciplinary proceedings, confidentiality prior to formal proceedings, Section 6086.1, Business and Professions Code.

Attorney, disciplinary proceeding, State Bar access to nonpublic court records, Section 6090.6, Business and Professions Code.

Attorney, law corporation, investigation by State Bar, confidentiality of, Section 6168, Business and Professions Code.

Attorney work product confidentiality in administrative adjudication, Section 11507.6.

Attorney, work product, confidentiality of, Section 6202, Business and Professions Code.

Attorney work product, discovery, Chapter 4 (commencing with Section 2018.010) of Title 4 of Part 4 of the Code of Civil Procedure.

Auditor General, access to records for audit purposes, Sections 10527 and 10527.1.

Auditor General, disclosure of audit records, Section 10525.

Automated forward facing parking control devices, confidentiality of video imaging records from the devices, Section 40240, Vehicle Code.

Automated traffic enforcement system, confidentiality of photographic records made by the system, Section 21455.5, Vehicle Code.

Automobile Insurance Claims Depository, confidentiality of information, Section 1876.3, Insurance Code.

Automobile Insurance, investigation of fraudulent claims, confidential information, Section 1872.8, Insurance Code.

Avocado handler transaction records, confidentiality of information, Section 44984, Food and Agricultural Code.  
(Amended by Stats. 2009, Ch. 584, Sec. 3. Effective January 1, 2010.)

**§279.06.** Bank and Corporation Tax, disclosure of information, Article 2 (commencing with Section 19542), Chapter 7, Part 10.2, Division 2, Revenue and Taxation Code.

Bank employees, confidentiality of criminal history information, Sections 777.5 and 4990, Financial Code.

Bank reports, confidentiality of, Section 289, Financial Code.

Basic Property Insurance Inspection and Placement Plan, confidential reports, Section 10097, Insurance Code.

Beef Council of California, confidentiality of fee transactions information, Section 64691.1, Food and Agricultural Code.

Bids, confidentiality of, Section 10304, Public Contract Code.

Birth, death, and marriage licenses, confidential information contained in, Sections 102100, 102110, and 102230, Health and Safety Code.

Birth defects, monitoring, confidentiality of information collected, Section 103850, Health and Safety Code.

Birth, live, confidential portion of certificate, Sections 102430, 102475, 103525, and 103590, Health and Safety Code.

Blood tests, confidentiality of hepatitis and AIDS carriers, Section 1603.1, Health and Safety Code.

Blood-alcohol percentage test results, vehicular offenses, confidentiality of, Section 1804, Vehicle Code.

Business and professions licensee exemption for social security number, Section 30, Business and Professions Code.  
(Amended by Stats. 2009, Ch. 584, Sec. 4. Effective January 1, 2010.)

**§276.08.** Cable television subscriber information, confidentiality of, Section 637.5, Penal Code.

CalFresh, disclosure of information, Section 18909, Welfare and Institutions Code.

California AIDS Program, personal data, confidentiality, Section 120820, Health and Safety Code.

California Apple Commission, confidentiality of lists of persons, Section 75598, Food and Agricultural Code.

California Apple Commission, confidentiality of proprietary information from producers or handlers, Section 75633, Food and Agricultural Code.

California Asparagus Commission, confidentiality of lists of producers, Section 78262, Food and Agricultural Code.

California Asparagus Commission, confidentiality of proprietary information from producers, Section 78288, Food and Agricultural Code.

California Avocado Commission, confidentiality of information from handlers, Section 67094, Food and Agricultural Code.

California Avocado Commission, confidentiality of proprietary information from handlers, Section 67104, Food and Agricultural Code.

California Cherry Commission, confidentiality of proprietary information from producers, processors, shippers, or grower-handlers, Section 76144, Food and Agricultural Code.

California Children's Services Program, confidentiality of factor replacement therapy contracts, Section 123853, Health and Safety Code.

California Cut Flower Commission, confidentiality of lists of producers, Section 77963, Food and Agricultural Code.

California Cut Flower Commission, confidentiality of proprietary information from producers, Section 77988, Food and Agricultural Code.

California Date Commission, confidentiality of proprietary information from producers and grower-handlers, Section 77843, Food and Agricultural Code.

California Egg Commission, confidentiality of proprietary information from handlers or distributors, Section 75134, Food and Agricultural Code.

California Forest Products Commission, confidentiality of lists of persons, Section 77589, Food and Agricultural Code.

California Forest Products Commission, confidentiality of proprietary information from producers, Section 77624, Food and Agricultural Code.

California Iceberg Lettuce Commission, confidentiality of information from handlers, Section 66624, Food and Agricultural Code.

California Kiwifruit Commission, confidentiality of proprietary information from producers or handlers, Section 68104, Food and Agricultural Code.

California Navel Orange Commission, confidentiality of proprietary information from producers or handlers and lists of producers and handlers, Section 73257, Food and Agricultural Code.

California Pepper Commission, confidentiality of lists of producers and handlers, Section 77298, Food and Agricultural Code.

California Pepper Commission, confidentiality of proprietary information from producers or handlers, Section 77334, Food and Agricultural Code.

California Pistachio Commission, confidentiality of proprietary information from producers or processors, Section 69045, Food and Agricultural Code.

California Salmon Commission, confidentiality of fee transactions records, Section 76901.5, Food and Agricultural Code.

California Salmon Commission, confidentiality of request for list of commercial salmon vessel operators, Section 76950, Food and Agricultural Code.

California Seafood Council, confidentiality of fee transaction records, Section 78553, Food and Agricultural Code.

California Seafood Council, confidentiality of information on volume of fish landed, Section 78575, Food and Agricultural Code.

California Sheep Commission, confidentiality of proprietary information from producers or handlers and lists of producers, Section 76343, Food and Agricultural Code.

California State University contract law, bids, questionnaires and financial statements, Section 10763, Public Contract Code.

California State University Investigation of Reported Improper Governmental Activities Act, confidentiality of investigative audits completed pursuant to the act, Section 89574, Education Code.

California Table Grape Commission, confidentiality of information from shippers, Section 65603, Food and Agricultural Code.

California Tomato Commission, confidentiality of lists of producers, handlers, and others, Section 78679, Food and Agricultural Code.

California Tomato Commission, confidentiality of proprietary information, Section 78704, Food and Agricultural Code.

California Tourism Marketing Act, confidentiality of information pertaining to businesses paying the assessment under the act, Section 13995.54.

California Victim Compensation and Government Claims Board, disclosure not required of records relating to assistance requests under Article I (commencing with Section 13950) of Chapter 5 of Part 4 of Division 3 of Title 2, Section 6254.17.

California Walnut Commission, confidentiality of lists of producers, Section 77101, Food and Agricultural Code.

California Walnut Commission, confidentiality of proprietary information from producers or handlers, Section 77154, Food and Agricultural Code.

California Wheat Commission, confidentiality of proprietary information from handlers and lists of producers, Section 72104, Food and Agricultural Code.

California Wheat Commission, confidentiality of requests for assessment refund, Section 72109, Food and Agricultural Code.

California Wine Commission, confidentiality of proprietary information from producers or vintners, Section 74655, Food and

Agricultural Code.

California Wine Grape Commission, confidentiality of proprietary information from producers and vintners, Section 74955, Food and Agricultural Code.

(Amended by Stats. 2011, Ch. 227, Sec. 6. Effective January 1, 2012.)

6278.10. Cancer registries, confidentiality of information, Section 103885, Health and Safety Code.

Candidate for local nonpartisan elective office, confidentiality of ballot statement, Section 13311, Elections Code.

Child abuse information, exchange by multidisciplinary personnel teams, Section 830, Welfare and Institutions Code.

Child abuse report and those making report, confidentiality of, Sections 11167 and 11167.5, Penal Code.

Child care liability insurance, confidentiality of information, Section 1864, Insurance Code.

Child concealer, confidentiality of address, Section 278.7, Penal Code.

Child custody investigation report, confidentiality of, Section 3111, Family Code.

Child day care facility, nondisclosure of complaint, Section 1596.853, Health and Safety Code.

Child health and disability prevention, confidentiality of health screening and evaluation results, Section 124110, Health and Safety Code.

Child sexual abuse reports, confidentiality of reports filed in a contested proceeding involving child custody or visitation rights, Section 3118, Family Code.

Child support, confidentiality of income tax return, Section 3552, Family Code.

Child support, promise to pay, confidentiality of, Section 7614, Family Code.

Childhood lead poisoning prevention, confidentiality of blood lead findings, Section 124130, Health and Safety Code.

Children and families commission, local, confidentiality of individually identifiable information, Section 130140.1, Health and Safety Code.

Cigarette tax, confidential information, Section 30455, Revenue and Taxation Code.

Civil actions, delayed disclosure for 30 days after complaint filed, Section 482.050, Code of Civil Procedure.

Closed sessions, document assessing vulnerability of state or local agency to disruption by terrorist or other criminal acts, subdivision (aa), Section 6254.

Closed sessions, meetings of local governments, pending litigation, Section 54956.9.

Colorado River Board, confidential information and records, Section 12519, Water Code.

Commercial fishing licensee, confidentiality of records, Section 7923, Fish and Game Code.

Commercial fishing reports, Section 8022, Fish and Game Code.

Community care facilities, confidentiality of client information, Section 1557.5, Health and Safety Code.

Community college employee, candidate examination records, confidentiality of, Section 88093, Education Code.

Community college employee, notice and reasons for nonreemployment, confidentiality, Section 87740, Education Code.

(Amended by Stats. 2009, Ch. 584, Sec. 6. Effective January 1, 2010.)

**§276.12.** Conservatee, confidentiality of the conservatee's report, Section 1826, Probate Code.

Conservatee, estate plan of, confidentiality of, Section 2586, Probate Code.

Conservatee with disability, confidentiality of report, Section 1827.5, Probate Code.

Conservator, confidentiality of conservator's birthdate and driver's license number, Section 1834, Probate Code.

Conservator, supplemental information, confidentiality of, Section 1821, Probate Code.

Conservatorship, court review of, confidentiality of report, Section 1851, Probate Code.

Consumer fraud investigations, access to complaints and investigations, Section 26509.

Consumption or utilization of mineral materials, disclosure of, Section 2207.1, Public Resources Code.

Contractor, evaluations and contractor responses, confidentiality of, Section 10370, Public Contract Code.

Contractor, license applicants, evidence of financial solvency, confidentiality of, Section 7067.5, Business and Professions Code.

Controlled Substance Law violations, confidential information, Section 818.7.

Controlled substance offenders, confidentiality of registration information, Section 11594, Health and Safety Code.

Cooperative Marketing Association, confidential information disclosed to conciliator, Section 54453, Food and Agricultural Code.

Coroner, inquests, subpoena duces tecum, Section 27491.8.

County aid and relief to indigents, confidentiality of investigation, supervision, relief, and rehabilitation records, Section 17006, Welfare and Institutions Code.

County alcohol programs, confidential information and records, Section 11812, Health and Safety Code.

County Employees' Retirement, confidential statements and records, Section 31532.

County mental health system, confidentiality of client information, Section 5610, Welfare and Institutions Code.

County social services, investigation of applicant, confidentiality, Section 18491, Welfare and Institutions Code.

County social services rendered by volunteers, confidentiality of records of recipients, Section 10810, Welfare and Institutions Code.

County special commissions, disclosure of health care peer review and quality assessment records not required, Section 14087.58, Welfare and Institutions Code.

County special commissions, disclosure of records relating to the commission's rates of payment for publicly assisted medical care not required, Section 14087.58, Welfare and Institutions Code.

Court files, access to, restricted for 60 days, Section 1161.2, Code of Civil Procedure.

Court reporters, confidentiality of records and reporters, Section 68525.

Court-appointed special advocates, confidentiality of information acquired or reviewed, Section 105, Welfare and Institutions Code.

Crane employers, previous business identities, confidentiality of, Section 7383, Labor Code.

Credit unions, confidentiality of investigation and examination reports, Section 14257, Financial Code.

Credit unions, confidentiality of employee criminal history information, Section 14409.2, Financial Code.

Criminal defendant, indigent, confidentiality of request for funds for investigators and experts, Section 987.9, Penal Code.

Criminal offender record information, access to, Sections 11076 and 13202, Penal Code.

Crop reports, confidential, subdivision (e), Section 6254.

Customer list of employment agency, trade secret, Section 16607, Business and Professions Code.

Customer list of telephone answering service, trade secret, Section 16606, Business and Professions Code.

*(Amended by Stats. 2009, Ch. 584, Sec. 7. Effective January 1, 2010.)*

**§276.14.** Dairy Council of California, confidentiality of ballots, Section 64155, Food and Agricultural Code.

Death, report that physician's or podiatrist's negligence or incompetence may be cause, confidentiality of, Section 802.5, Business and Professions Code.

Dental hygienist drug and alcohol diversion program, confidentiality of records pertaining to treatment, Section 1966.5, Business and Professions Code.

Dentist advertising and referral contract exemption, Section 650.2, Business and Professions Code.

Dentist, alcohol or dangerous drug rehabilitation and diversion, confidentiality of records, Section 1698, Business and Professions Code.

Department of Consumer Affairs licensee exemption for alcohol or dangerous drug treatment and rehabilitation records, Section 156.1, Business and Professions Code.

Department of Motor Vehicles, confidentiality of information provided by an insurer, Section 4750.4, Vehicle Code.

Department of Motor Vehicles, confidentiality of the home address of specified persons in the records of the Department of Motor Vehicles, Section 1808.6, Vehicle Code.

Developmentally disabled conservatee confidentiality of reports and records, Sections 416.8 and 416.18, Health and Safety Code.

Developmentally disabled person, access to information provided by family member, Section 4727, Welfare and Institutions Code.

Developmentally disabled person and person with mental illness, access to and release of information about, by protection and advocacy agency, Section 4903, Welfare and Institutions Code.

Developmentally disabled person, confidentiality of patient records, state agencies, Section 4553, Welfare and Institutions Code.

Developmentally disabled person, confidentiality of records and information, Sections 4514 and 4518, Welfare and Institutions Code.

Diesel Fuel Tax Information, disclosure prohibited, Section 60609, Revenue and Taxation Code.

Disability compensation, confidential medical records, Section 2714, Unemployment Insurance Code.

Disability Insurance, access to registered information, Section 789.7, Insurance Code.

Discrimination complaint to Division of Labor Standards Enforcement, confidentiality of witnesses, Section 98.7, Labor Code.

Dispute resolution participants confidentiality, Section 471.5, Business and Professions Code.

Division of Workers' Compensation, confidentiality of data obtained by the administrative director and derivative works created by the division, Sections 3201.5, 3201.7, and 3201.9, Labor Code.

Division of Workers' Compensation, individually identifiable information and residence addresses obtained or maintained by the division on workers' compensation claims, confidentiality of, Section 138.7, Labor Code.

Division of Workers' Compensation, individually identifiable information of health care organization patients, confidentiality of, Section 4600.5, Labor Code.

Division of Workers' Compensation, individual workers' compensation claim files and auditor's working papers, confidentiality of, Section 129, Labor Code.

Division of Workers' Compensation, peer review proceedings and employee medical records, confidentiality of, Section 4600.6, Labor Code.

Domestic violence counselor and victim, confidentiality of communication, Sections 1037.2 and 1037.5, Evidence Code.

Driver arrested for traffic violation, notice of reexamination for evidence of incapacity, confidentiality of, Section 40313, Vehicle Code.

Driving school and driving instructor licensee records, confidentiality of, Section 11108, Vehicle Code.

*(Amended by Stats. 2009, Ch. 584, Sec. 8. Effective January 1, 2010.)*

**§276.16.** Educational psychologist-patient, privileged communication, Section 1010.5, Evidence Code.

Electronic and appliance repair dealer, service contractor, financial data in applications, subdivision (x), Section 6254.

Electronic Recording Delivery Act of 2004, exemption from disclosure for computer security reports, Section 27394.

Emergency Care Data Record, exemption from disclosure for identifying information, Section 128736, Health and Safety Code.

Emergency Medical Services Fund, patient named, Section 1797.98c, Health and Safety Code.

Emergency medical technicians, confidentiality of disciplinary investigation information, Section 1798.200, Health and Safety Code.

Emergency Medical Technician-Paramedic (EMT-P), exemption from disclosure for records relating to personnel actions against, or resignation of, an EMT-P for disciplinary cause or reason, Section 1799.112, Health and Safety Code.

Eminent domain proceedings, use of state tax returns, Section 1263.520, Code of Civil Procedure.

Employment agency, confidentiality of customer list, Section 16607, Business and Professions Code.

Employment application, nondisclosure of arrest record or certain convictions, Sections 432.7 and 432.8, Labor Code.

Employment Development Department, furnishing materials, Section 307, Unemployment Insurance Code.

Enteral nutrition products, confidentiality of contracts by the State Department of Health Care Services with manufacturers of enteral nutrition products, Section 14105.8, Welfare and Institutions Code.

Equal wage rate violation, confidentiality of complaint, Section 1197.5, Labor Code.

Equalization, State Board of, prohibition against divulging information, Section 15619.

Escrow Agents' Fidelity Corporation, confidentiality of examination and investigation reports, Section 17336, Financial Code.

Escrow agents' confidentiality of reports on violations, Section 17414, Financial Code.

Escrow agents' confidentiality of state summary criminal history information, Section 17414.1, Financial Code.

Estate tax, confidential records and information, Section 14251, Revenue and Taxation Code.

Excessive rates or complaints, reports, Section 1857.9, Insurance Code.

Executive Department, closed sessions and the record of topics discussed, Sections 11126 and 11126.1.

Executive Department, investigations and hearings, confidential nature of information acquired, Section 11183.

*(Amended by Stats. 2009, Ch. 584, Sec. 9. Effective January 1, 2010.)*

**§276.18.** Family Court, records, Section 1818, Family Code.

Farm product processor license, confidentiality of financial statements, Section 55523.6, Food and Agricultural Code.

Farm product processor licensee, confidentiality of grape purchases, Section 55601.5, Food and Agricultural Code.

Fee payer information, prohibition against disclosure by Board of Equalization and others, Section 55381, Revenue and Taxation Code.

Financial institutions, issuance of securities, reports and records of state agencies, subdivision (d), Section 6254.

Financial statements of insurers, confidentiality of information received, Section 925.3, Insurance Code.

Financial statements and questionnaires, of prospective bidders for the state, confidentiality of, Section 10165, Public Contract Code.

Financial statements and questionnaires, of prospective bidders for California State University contracts, confidentiality of, Section 10763, Public Contract Code.

Firearms, centralized list of exempted federal firearms licensees, disclosure of information compiled from, Sections 24850 to 24890, Inclusive, Penal Code.

Firearms, centralized list of dealers and licensees, disclosure of information compiled from, Sections 26700 to 26915, Inclusive, Penal Code.

Firearm license applications, subdivision (u), Section 6254.

Firearm sale or transfer, confidentiality of records, Chapter 5 (commencing with Section 28050) of Division 6 of Title 4 of Part 6, Penal Code.

Fishing and hunting licenses, confidentiality of names and addresses contained in records submitted to the Department of Fish and Game to obtain recreational fishing and hunting licenses, Section 1050.6, Fish and Game Code.

Foreign marketing of agricultural products, confidentiality of financial information, Section 58577, Food and Agricultural Code.

Forest fires, anonymity of informants, Section 4417, Public Resources Code.

Foster homes, identifying information, Section 1536, Health and Safety Code.

Franchise Tax Board, access to Franchise Tax Board information by the State Department of Social Services, Section 11025, Welfare and Institutions Code.

Franchise Tax Board, auditing, confidentiality of, Section 90005.

Franchises, applications, and reports filed with Commissioner of Corporations, disclosure and withholding from public inspection, Section 31504, Corporations Code.

Fur dealer licensee, confidentiality of records, Section 4041, Fish and Game Code.

*(Amended (as amended by Stats. 2010, Ch. 178) by Stats. 2011, Ch. 227, Sec. 8. Effective January 1, 2012. Operative January 1, 2012, pursuant to Stats. 2010, Ch. 178, Sec. 107.)*

**§278.22.** Gambling Control Act, exemption from disclosure for records of the California Gambling Control Commission and the Department of Justice, Sections 19819 and 19821, Business and Professions Code.

Genetically Handicapped Person's Program, confidentiality of factor replacement therapy contracts, Section 125191, Health and Safety Code.

Governor, correspondence of and to Governor and Governor's office, subdivision (l), Section 6254.

Governor, transfer of public records in control of, restrictions on public access, Section 6268.

Grand jury, confidentiality of request for special counsel, Section 936.7, Penal Code.

Grand jury, confidentiality of transcription of indictment or accusation, Section 938.1, Penal Code.

Group Insurance, public employees, Section 53202.25.

Guardian, confidentiality of report used to check ability, Section 2342, Probate Code.

Guardianship, confidentiality of report regarding the suitability of the proposed guardian, Section 1543, Probate Code.

Guardianship, disclosure of report and recommendation concerning proposed guardianship of person or estate, Section 1513, Probate Code.

*(Amended by Stats. 2009, Ch. 584, Sec. 11. Effective January 1, 2010.)*

**§278.24.** Hazardous substance tax information, prohibition against disclosure, Section 43651, Revenue and Taxation Code.

Hazardous waste control, business plans, public inspection, Section 25506, Health and Safety Code.

Hazardous waste control, notice of unlawful hazardous waste disposal, Section 25180.5, Health and Safety Code.

Hazardous waste control, trade secrets, disclosure of information, Sections 25511 and 25538, Health and Safety Code.

Hazardous waste control, trade secrets, procedures for release of information, Section 25358.2, Health and Safety Code.

Hazardous waste generator report, protection of trade secrets, Sections 25244.21 and 25244.23, Health and Safety Code.

Hazardous waste licensor disclosure statement, confidentiality of, Section 25186.5, Health and Safety Code.

Hazardous waste recycling, information clearing house, confidentiality of trade secrets, Section 25170, Health and Safety Code.

Hazardous waste recycling, list of specified hazardous wastes, trade secrets, Section 25175, Health and Safety Code.

Hazardous waste recycling, trade secrets, confidential nature, Sections 25173 and 25180.5, Health and Safety Code.

Healing arts licensees, central files, confidentiality, Section 800, Business and Professions Code.

Health authorities, special county, confidentiality of records, Sections 14087.35, 14 087.36, and 14087.38, Welfare and Institutions Code.

Health care provider disciplinary proceeding, confidentiality of documents, Section 805.1, Business and Professions Code.

Health care service plans, review of quality of care, privileged communications, Sections 1370 and 1380, Health and Safety Code.

Health commissions, special county, confidentiality of peer review proceedings, rates of payment, and trade secrets, Section 14087.31, Welfare and Institutions Code.

Health facilities, patient's rights of confidentiality, subdivision (c) of Section 128745 and Sections 128735, 128736, 128737, 128755,

and 128765, Health and Safety Code.

Health personnel, data collection by the Office of Statewide Health Planning and Development, confidentiality of information on individual licentiate, Section 127780, Health and Safety Code.

Health plan governed by a county board of supervisors, exemption from disclosure for records relating to provider rates or payments for a three-year period after execution of the provider contract, Sections 6254.22 and 54956.87.

Hereditary Disorders Act, legislative finding and declaration, confidential information, Sections 124975 and 124980, Health and Safety Code.

Hereditary Disorders Act, rules, regulations, and standards, breach of confidentiality, Section 124980, Health and Safety Code.

HIV, disclosures to blood banks by department or county health officers, Section 1603.1, Health and Safety Code.

Home address of public employees and officers in Department of Motor Vehicles, records, confidentiality of, Sections 1808.2 and 1808.4, Vehicle Code.

Horse racing, horses, blood or urine test sample, confidentiality, Section 19577, Business and Professions Code.

Hospital district and municipal hospital records relating to contracts with insurers and service plans, subdivision (t), Section 6254.

Hospital final accreditation report, subdivision (s), Section 6254.

Housing authorities, confidentiality of rosters of tenants, Section 34283, Health and Safety Code.

Housing authorities, confidentiality of applications by prospective or current tenants, Section 34332, Health and Safety Code.

*(Amended by Stats. 2009, Ch. 584, Sec. 12.5. Effective January 1, 2010.)*

**6276.26.** Improper governmental activities reporting, confidentiality of identity of person providing information, Section 8547.5.

Improper governmental activities reporting, disclosure of information, Section 8547.6.

Industrial loan companies, confidentiality of financial information, Section 18496, Financial Code.

Industrial loan companies, confidentiality of investigation and examination reports, Section 18394, Financial Code.

Influenza vaccine, trade secret information and information relating to recipient of vaccine, Section 120155, Health and Safety Code.

In forma pauperis litigant, rules governing confidentiality of financial information, Section 68511.3.

Infrastructure information, exemption from disclosure for information voluntarily submitted to the Office of Emergency Services, subdivision (ab), Section 6254.

In-Home Supportive Services Program, exemption from disclosure for information regarding persons paid by the state to provide in-home supportive services, Section 6253.2.

Initiative, referendum, recall, and other petitions, confidentiality of names of signers, Section 6253.5.

Insurance claims analysis, confidentiality of information, Section 1875.16, Insurance Code.

Insurance Commissioner, confidential information, Sections 735.5, 1067.11, 1077.3, and 12919, Insurance Code.

Insurance Commissioner, informal conciliation of complaints, confidential communications, Section 1858.02, Insurance Code.

Insurance Commissioner, information from examination or investigation, confidentiality of, Sections 1215.7, 1433, and 1759.3, Insurance Code.

Insurance Commissioner, writings filed with nondisclosure, Section 855, Insurance Code.

Insurance fraud reporting, information acquired not part of public record, Section 1873.1, Insurance Code.

Insurance licensee, confidential information, Section 1666.5, Insurance Code.

Insurer application information, confidentiality of, Section 925.3, Insurance Code.

Insurer financial analysis ratios and examination synopses, confidentiality of, Section 933, Insurance Code.

Department of Resources Recycling and Recovery information, prohibition against disclosure, Section 45982, Revenue and Taxation Code.

International wills, confidentiality of registration information filed with the Secretary of State, Section 6389, Probate Code.

Intervention in regulatory and ratemaking proceedings, audit of customer seeking and award, Section 1804, Public Utilities Code.

Investigation and security records, exemption from disclosure for records of the Attorney General, the Department of Justice, the Office of Emergency Services, and state and local police agencies, subdivision (f), Section 6254.

Investigative consumer reporting agency, limitations on furnishing an investigative consumer report, Section 1786.12, Civil Code.

*(Amended by Stats. 2013, Ch. 352, Sec. 108. Effective September 26, 2013. Operative July 1, 2013, by Sec. 543 of Ch. 352.)*

**6276.28.** Joint Legislative Ethics Committee, confidentiality of reports and records, Section 8953.

Judicial candidates, confidentiality of communications concerning, Section 12011.5.

Judicial proceedings, confidentiality of employer records of employee absences, Section 230.2, Labor Code.

Jurors' lists, lists of registered voters and licensed drivers as source for, Section 197, Code of Civil Procedure.

Juvenile court proceedings to adjudicate a person a dependent child of court, sealing records of, Section 389, Welfare and Institutions Code.

Juvenile criminal records, dissemination to schools, Section 828.1, Welfare and Institutions Code.

Juvenile delinquents, notification of chief of police or sheriff of escape of minor from secure detention facility, Section 1155, Welfare

and Institutions Code.

Labor dispute, investigation and mediation records, confidentiality of, Section 65, Labor Code.

Lanterman-Petris-Short Act, mental health services recipients, confidentiality of information and records, mental health advocate, Sections 5540, 5541, 5542, and 5550, Welfare and Institutions Code.

Law enforcement vehicles, registration disclosure, Section 5003, Vehicle Code.

Legislative Counsel records, subdivision (m), Section 6254.

Library circulation records and other materials, subdivision (l), Section 6254 and Section 6267.

Life and disability insurers, actuarial information, confidentiality of, Section 10489.15, Insurance Code.

Litigation, confidentiality of settlement information, Section 68513.

Local agency legislative body, closed sessions, disclosure of materials, Section 54956.9.

Local government employees, confidentiality of records and claims relating to group insurance, Section 53202.25.

Local summary criminal history information, confidentiality of, Sections 13300 and 13305, Penal Code.

Local agency legislative body, closed session, nondisclosure of minute book, Section 54957.2.

Local agency legislative body, meeting, disclosure of agenda, Section 54957.5.

Long-term health facilities, confidentiality of complaints against, Section 1419, Health and Safety Code.

Long-term health facilities, confidentiality of records retained by State Department of Public Health, Section 1439, Health and Safety Code.

Los Angeles County Tourism Marketing Commission, confidentiality of information obtained from businesses to determine their assessment, Section 13995.108.

*(Amended by Stats. 2009, Ch. 584, Sec. 14, Effective January 1, 2010.)*

**§276.30.** Managed care health plans, confidentiality of proprietary information, Section 14091.3, Welfare and Institutions Code.

Managed Risk Medical Insurance Board, negotiations with entities contracting or seeking to contract with the board, subdivisions (v) and (y) of Section 6254.

Mandated blood testing and confidentiality to protect public health, prohibition against compelling identification of test subjects, Section 120975, Health and Safety Code.

Mandated blood testing and confidentiality to protect public health, unauthorized disclosures of identification of test subjects, Sections 1603.1, 1603.3, and 121022, Health and Safety Code.

Mandated blood testing and confidentiality to protect public health, disclosure to patient's spouse, sexual partner, needle sharer, or county health officer, Section 121015, Health and Safety Code.

Manufactured home, mobilehome, floating home, confidentiality of home address of registered owner, Section 18081, Health and Safety Code.

Marital confidential communications, Sections 980, 981, 982, 983, 984, 985, 986, and 987, Evidence Code.

Market reports, confidential, subdivision (e), Section 6254.

Marketing of commodities, confidentiality of financial information, Section 58781, Food and Agricultural Code.

Marketing orders, confidentiality of processors' or distributors' information, Section 59202, Food and Agricultural Code.

Marriage, confidential, certificate, Section 511, Family Code.

Medi-Cal Benefits Program, confidentiality of information, Section 14100.2, Welfare and Institutions Code.

Medi-Cal Benefits Program, Request of Department for Records of Information, Section 14124.89, Welfare and Institutions Code.

Medi-Cal Fraud Bureau, confidentiality of complaints, Section 12528.

Medi-Cal managed care program, exemption from disclosure for financial and utilization data submitted by Medi-Cal managed care health plans to establish rates, Section 14301.1, Welfare and Institutions Code.

Medi-Cal program, exemption from disclosure for best price contracts between the State Department of Health Care Services and drug manufacturers, Section 14105.33, Welfare and Institutions Code.

Medical information, disclosure by provider unless prohibited by patient in writing, Section 56.16, Civil Code.

Medical information, types of information not subject to patient prohibition of disclosure, Section 56.30, Civil Code.

Medical and other hospital committees and peer review bodies, confidentiality of records, Section 1157, Evidence Code.

Medical or dental licensee, action for revocation or suspension due to illness, report, confidentiality of, Section 828, Business and Professions Code.

Medical or dental licensee, disciplinary action, denial or termination of staff privileges, report, confidentiality of, Sections 805, 805.1, and 805.5, Business and Professions Code.

Meetings of state agencies, disclosure of agenda, Section 11125.1.

Mentally abnormal sex offender committed to state hospital, confidentiality of records, Section 4135, Welfare and Institutions Code.

Mentally disordered and developmentally disabled offenders, access to criminal histories of, Section 1620, Penal Code.

Mentally disordered persons, court-ordered evaluation, confidentiality of reports, Section 5202, Welfare and Institutions Code.

Mentally disordered or mentally ill person, confidentiality of written consent to detention, Section 5326.4, Welfare and Institutions

## Code.

Mentally disordered or mentally ill person, voluntarily or involuntarily detained and receiving services, confidentiality of records and information, Sections 5328, 5328.15, 5328.2, 5328.4, 5328.8, and 5328.9, Welfare and Institutions Code.

Mentally disordered or mentally ill person, weapons restrictions, confidentiality of information about, Section 8103, Welfare and Institutions Code.

Milk marketing, confidentiality of records, Section 61443, Food and Agricultural Code.

Milk product certification, confidentiality of, Section 62121, Food and Agricultural Code.

Milk, market milk, confidential records and reports, Section 62243, Food and Agricultural Code.

Milk product registration, confidentiality of information, Section 38946, Food and Agricultural Code.

Milk equalization pool plan, confidentiality of producers' voting, Section 62716, Food and Agricultural Code.

Mining report, confidentiality of report containing information relating to mineral production, reserves, or rate of depletion of mining operation, Section 2207, Public Resources Code.

Minor, criminal proceeding testimony closed to public, Section 859.1, Penal Code.

Minors, material depicting sexual conduct, records of suppliers to be kept and made available to law enforcement, Section 1309.5, Labor Code.

Misdemeanor and felony reports by police chiefs and sheriffs to Department of Justice, confidentiality of, Sections 11107 and 11107.5, Penal Code.

Monetary instrument transaction records, confidentiality of, Section 14167, Penal Code.

Missing persons' information, disclosure of, Sections 14201 and 14203, Penal Code.

Morbidity and mortality studies, confidentiality of records, Section 100330, Health and Safety Code.

Motor vehicle accident reports, disclosure, Sections 16005, 20012, and 20014, Vehicle Code.

Motor vehicles, department of, public records, exceptions, Sections 1808 to 1808.7, Inclusive, Vehicle Code.

Motor vehicle insurance fraud reporting, confidentiality of information acquired, Section 1874.3, Insurance Code.

Motor vehicle liability insurer, data reported to Department of Insurance, confidentiality of, Section 11628, Insurance Code.

Multijurisdictional drug law enforcement agency, closed sessions to discuss criminal investigation, Section 54957.8.

*(Amended by Stats. 2009, Ch. 584, Sec. 15. Effective January 1, 2010.)*

**§278.32.** Narcotic addict outpatient revocation proceeding, confidentiality of reports, Section 3152.5, Welfare and Institutions Code.

Narcotic and drug abuse patients, confidentiality of records, Section 11845.5, Health and Safety Code.

Native American graves, cemeteries and sacred places, records of, subdivision (f), Section 6254.

Notary public, confidentiality of application for appointment and commission, Section 8201.5.

Nurse, alcohol or dangerous drug diversion and rehabilitation records, confidentiality of, Section 2770.12, Business and Professions Code.

Obscene matter, defense of scientific or other purpose, confidentiality of recipients, Section 311.8, Penal Code.

Occupational safety and health investigations, confidentiality of complaints and complainants, Section 6309, Labor Code.

Occupational safety and health investigations, confidentiality of trade secrets, Section 6322, Labor Code.

Official information acquired in confidence by public employee, disclosure of, Sections 1040 and 1041, Evidence Code.

Oil and gas, confidentiality of proposals for the drilling of a well, Section 3724.4, Public Resources Code.

Oil and gas, disclosure of onshore and offshore exploratory well records, Section 3234, Public Resources Code.

Oil and gas, disclosure of well records, Section 3752, Public Resources Code.

Oil and gas leases, surveys for permits, confidentiality of information, Section 6826, Public Resources Code.

Oil spill fee-payer information, prohibition against disclosure, Section 46751, Revenue and Taxation Code.

Older adults receiving county services, providing information between county agencies, confidentiality of, Section 9401, Welfare and Institutions Code.

Organic food certification organization records, release of, Section 110845, Health and Safety Code.

Osteopathic physician and surgeon, rehabilitation and diversion records, confidentiality of, Section 2369, Business and Professions Code.

*(Amended by Stats. 2009, Ch. 584, Sec. 16. Effective January 1, 2010.)*

**§278.34.** Parole revocation proceedings, confidentiality of information in reports, Section 3063.5, Penal Code.

Passenger fishing boat licenses, records, Section 7923, Fish and Game Code.

Paternity, acknowledgement, confidentiality of records, Section 102760, Health and Safety Code.

Patient-physician confidential communication, Sections 992 and 994, Evidence Code.

Patient records, confidentiality of, Section 123135, Health and Safety Code.

Payment instrument licensee records, inspection of, Section 33206, Financial Code.

Payroll records, confidentiality of, Section 1776, Labor Code.

Peace officer personnel records, confidentiality of, Sections 832.7 and 832.8, Penal Code.

Penitential communication between penitent and clergy, Sections 1032 and 1033, Evidence Code.

Personal Care Services Program, exemption from disclosure for information regarding persons paid by the state to provide personal care services, Section 6253.2.

Personal Income Tax, disclosure of information, Article 2 (commencing with Section 19542), Chapter 7, Part 10.2, Division 2, Revenue and Taxation Code.

Personal information, Information Practices Act, prohibitions against disclosure by state agencies, Sections 1798.24 and 1798.75, Civil Code.

Personal information, subpoena of records containing, Section 1985.4, Code of Civil Procedure.

Personal representative, confidentiality of personal representative's birth date and driver's license number, Section 8404, Probate Code.

Personnel Administration, Department of, confidentiality of pay data furnished to, Section 19826.5.

Petition signatures, Section 18650, Elections Code.

Petroleum supply and pricing, confidential information, Sections 25364 and 25366, Public Resources Code.

Pharmacist, alcohol or dangerous drug diversion and rehabilitation records, confidentiality of, Section 4372, Business and Professions Code.

Physical therapist or assistant, records of dangerous drug or alcohol diversion and rehabilitation, confidentiality of, Section 2667, Business and Professions Code.

Physical or mental condition or conviction of controlled substance offense, records in Department of Motor Vehicles, confidentiality of, Section 1808.5, Vehicle Code.

Physician and surgeon, rehabilitation and diversion records, confidentiality of, Section 2355, Business and Professions Code.

Physician assistant, alcohol or dangerous drug diversion and rehabilitation records, confidentiality of, Section 3534.7, Business and Professions Code.

Physician competency examination, confidentiality of reports, Section 2294, Business and Professions Code.

Physicians and surgeons, confidentiality of reports of patients with a lapse of consciousness disorder, Section 103900, Health and Safety Code.

Physician Services Account, confidentiality of patient names in claims, Section 16956, Welfare and Institutions Code.

Pilots, confidentiality of personal information, Section 1157.1, Harbors and Navigation Code.

Pollution Control Financing Authority, financial data submitted to, subdivision (c), Section 6254.

Postmortem or autopsy photos, Section 129, Code of Civil Procedure.

*(Amended by Stats. 2009, Ch. 584, Sec. 17. Effective January 1, 2010.)*

**6276.36.** Pregnancy tests by local public health agencies, confidentiality of, Section 123380, Health and Safety Code.

Pregnant women, confidentiality of blood tests, Section 125105, Health and Safety Code.

Prehospital emergency medical care, release of information, Sections 1797.188 and 1797.189, Health and Safety Code.

Prenatal syphilis tests, confidentiality of, Section 120705, Health and Safety Code.

Prescription drug discounts, confidentiality of corporate proprietary information, Section 130506, Health and Safety Code.

Prisoners, behavioral research on, confidential personal information, Section 3515, Penal Code.

Prisoners, confidentiality of blood tests, Section 7530, Penal Code.

Prisoners, medical testing, confidentiality of records, Sections 7517 and 7540, Penal Code.

Prisoners, transfer from county facility for mental treatment and evaluation, confidentiality of written reasons, Section 4011.6, Penal Code.

Private industry wage data collected by public entity, confidentiality of, Section 6254.6.

Private railroad car tax, confidentiality of information, Section 11655, Revenue and Taxation Code.

Probate referee, disclosure of materials, Section 8908, Probate Code.

Probation officer reports, inspection of, Section 1203.05, Penal Code.

Produce dealer, confidentiality of financial statements, Section 56254, Food and Agricultural Code.

Products liability insurers, transmission of information, Section 1857.9, Insurance Code.

Professional corporations, financial statements, confidentiality of, Section 13406, Corporations Code.

Property on loan to museum, notice of intent to preserve an interest in, not subject to disclosure, Section 1899.5, Civil Code.

Property taxation, confidentiality of change of ownership, Section 481, Revenue and Taxation Code.

Property taxation, confidentiality of exemption claims, Sections 63.1, 69.5, and 408.2, Revenue and Taxation Code.

Property taxation, confidentiality of property information, Section 15641, Government Code and Section 833, Revenue and Taxation Code.

Proprietary information, availability only to the director and other persons authorized by the operator and the owner, Section 2778,

Public Resources Code.

Psychologist and client, confidential relations and communications, Section 2918, Business and Professions Code.

Psychotherapist-patient confidential communication, Sections 1012 and 1014, Evidence Code.

Public employees' home addresses and telephone numbers, confidentiality of, Section 6254.3.

Public Employees' Medical and Hospital Care Act, confidentiality of data relating to health care services rendered by participating hospitals to members and annuitants, Section 22854.5.

Public Employees' Retirement System, confidentiality of data filed by member or beneficiary with board of administration, Section 20134.

Public investment funds, exemption from disclosure for records regarding alternative investments, Section 6254.26.

Public school employees organization, confidentiality of proof of majority support submitted to Public Employment Relations Board, Sections 3544, 3544.1, and 3544.5.

Public social services, confidentiality of digest of decisions, Section 10964, Welfare and Institutions Code.

Public social services, confidentiality of information regarding child abuse or elder or dependent persons abuse, Section 10850.1, Welfare and Institutions Code.

Public social services, confidentiality of information regarding eligibility, Section 10850.2, Welfare and Institutions Code.

Public social services, confidentiality of records, Section 10850, Welfare and Institutions Code.

Public social services, disclosure of information to law enforcement agencies, Section 10850.3, Welfare and Institutions Code.

Public social services, disclosure of information to law enforcement agencies regarding deceased applicant or recipient, Section 10850.7, Welfare and Institutions Code.

Public utilities, confidentiality of information, Section 583, Public Utilities Code.

Pupil, confidentiality of personal information, Section 45345, Education Code.

Pupil drug and alcohol use questionnaires, confidentiality of, Section 11605, Health and Safety Code.

Pupil, expulsion hearing, disclosure of testimony of witness and closed session of district board, Section 48918, Education Code.

Pupil, personal information disclosed to school counselor, confidentiality of, Section 49602, Education Code.

Pupil record contents, records of administrative hearing to change contents, confidentiality of, Section 49070, Education Code.

Pupil records, access authorized for specified parties, Section 49076, Education Code.

Pupil records, disclosure in hearing to dismiss or suspend school employee, Section 44944.1, Education Code.

Pupil records, release of directory information to private entities, Sections 49073 and 49073.5, Education Code.

*(Amended by Stats. 2009, Ch. 584, Sec. 18. Effective January 1, 2010.)*

**§275.38.** Radioactive materials, dissemination of information about transportation of, Section 33002, Vehicle Code.

Railroad infrastructure protection program, disclosure not required for risk assessments filed with the Public Utilities Commission, the Director of Emergency Services, or the Office of Emergency Services, Section 6254.23.

Real estate broker, annual report to Bureau of Real Estate of financial information, confidentiality of, Section 10232.2, Business and Professions Code.

Real property, acquisition by state or local government, information relating to feasibility, subdivision (h), Section 6254.

Real property, change in ownership statement, confidentiality of, Section 27280.

Records of contract purchasers, inspection by public prohibited, Section 85, Military and Veterans Code.

Registered public obligations, inspection of records of security interests in, Section 5060.

Registration of exempt vehicles, nondisclosure of name of person involved in alleged violation, Section 5003, Vehicle Code.

Rehabilitation, Department of, confidential information, Section 19016, Welfare and Institutions Code.

Reinsurance intermediary-broker license information, confidentiality of, Section 1781.3, Insurance Code.

Relocation assistance, confidential records submitted to a public entity by a business or farm operation, Section 7262.

Rent control ordinance, confidentiality of information concerning accommodations sought to be withdrawn from, Section 7060.4.

Report of probation officer, inspection, copies, Section 1203.05, Penal Code.

Repossession agency licensee application, confidentiality of information, Sections 7503, 7504, and 7506.5, Business and Professions Code.

Reproductive health facilities, disclosure not required for personal information regarding employees, volunteers, board members, owners, partners, officers, and contractors of a reproductive health services facility who have provided requisite notification, Section 6254.18.

Residence address in any record of Department of Housing and Community Development, confidentiality of, Section 6254.1.

Residence address in any record of Department of Motor Vehicles, confidentiality of, Section 6254.1, Government Code, and Section 1808.21, Vehicle Code.

Residence and mailing addresses in records of Department of Motor Vehicles, confidentiality of, Section 1810.7, Vehicle Code.

Residential care facilities, confidentiality of resident information, Section 1568.08, Health and Safety Code.

Residential care facilities for the elderly, confidentiality of client information, Section 1569.315, Health and Safety Code.

Respiratory care practitioner, professional competency examination reports, confidentiality of, Section 3756, Business and Professions Code.

Restraint of trade, civil action by district attorney, confidential memorandum, Section 16750, Business and Professions Code.

Reward by governor for information leading to arrest and conviction, confidentiality of person supplying information, Section 1547, Penal Code.

Safe surrender site, confidentiality of information pertaining to a parent or individual surrendering a child, Section 1255.7, Health and Safety Code.

*(Amended by Stats. 2013, Ch. 352, Sec. 109, Effective September 26, 2013. Operative July 1, 2013, by Sec. 543 of Ch. 352.)*

**§275.40.** Sales and use tax, disclosure of information, Section 7056, Revenue and Taxation Code.

Santa Barbara Regional Health Authority, exemption from disclosure for records maintained by the authority regarding negotiated rates for the California Medical Assistance Program, Section 14499.6, Welfare and Institutions Code.

Savings association employees, disclosure of criminal history information, Section 6525, Financial Code.

Savings associations, inspection of records by shareholders, Section 6050, Financial Code.

School district governing board, disciplinary action, disclosure of pupil information, Section 35146, Education Code.

School employee, merit system examination records, confidentiality of, Section 45274, Education Code.

School employee, notice and reasons for hearing on nonreemployment of employee, confidentiality of, Sections 44948.5 and 44949, Education Code.

School meals for needy pupils, confidentiality of records, Section 49558, Education Code.

Sealed records, arrest for misdemeanor, Section 851.7, Penal Code.

Sealed records, misdemeanor convictions, Section 1203.45, Penal Code.

Sealing and destruction of arrest records, determination of innocence, Section 851.8, Penal Code.

Search warrants, special master, Section 1524, Penal Code.

Sex change, confidentiality of birth certificate, Section 103440, Health and Safety Code.

Sex offenders, registration form, Section 290.021, Penal Code.

Sexual assault forms, confidentiality of, Section 13823.5, Penal Code.

Sexual assault counselor and victim, confidential communication, Sections 1035.2, 1035.4, and 1035.8, Evidence Code.

Shorthand reporter's complaint, Section 8010, Business and Professions Code.

Small family day care homes, identifying information, Section 1596.86, Health and Safety Code.

Social security number, applicant for driver's license or identification card, nondisclosure of, Section 1653.5, Vehicle Code, and

**Section 6254.29.**

Social security number, official record or official filing, nondisclosure of, Section 9526.5, Commercial Code, and Sections 6254.27 and 6254.28.

Social Security Number Truncation Program, Article 3.5 (commencing with Section 27300), Chapter 6, Part 3, Division 2, Title 3.

Social security numbers within records of local agencies, nondisclosure of, Section 6254.29.

*(Amended by Stats. 2009, Ch. 584, Sec. 20. Effective January 1, 2010.)*

**6276.42.** State agency activities relating to unrepresented employees, subdivision (p) of Section 6254.

State agency activities relating to providers of health care, subdivision (a) of Section 6254.

State Auditor, access to barred records, Section 8545.2.

State Auditor, confidentiality of records, Sections 8545, 8545.1, and 8545.3.

State civil service employee, confidentiality of appeal to state personnel board, Section 18952.

State civil service employees, confidentiality of reports, Section 18573.

State civil service examination, confidentiality of application and examination materials, Section 18934.

State Compensation Insurance Fund, exemption from disclosure for various records maintained by the State Compensation Insurance Fund, subdivision (ad), Section 6254.

State Contract Act, bids, questionnaires and financial statements, Section 10165, Public Contract Code.

State Contract Act, bids, sealing, opening and reading bids, Section 10304, Public Contract Code.

State Energy Resources Conservation and Development Commission, confidentiality of proprietary information submitted to, Section 25223, Public Resources Code.

State hospital patients, information and records in possession of Superintendent of Public Instruction, confidentiality of, Section 56863, Education Code.

State Long-Term Care Ombudsman, access to government agency records, Section 9723, Welfare and Institutions Code.

State Long-Term Care Ombudsman office, confidentiality of records and files, Section 9725, Welfare and Institutions Code.

State Long-Term Care Ombudsman office, disclosure of information or communications, Section 9715, Welfare and Institutions Code.

State Lottery Evaluation Report, disclosure, Section 8880.46.

State prisoners, exemption from disclosure for surveys by the California Research Bureau of children of female prisoners, Section 7443, Penal Code.

State summary criminal history information, confidentiality of information, Sections 11105, 11105.1, 11105.3, and 11105.4, Penal Code.

State Teachers' Retirement System, confidentiality of information filed with the system by a member, participant, or beneficiary, Sections 22306 and 26215, Education Code.

Sterilization of disabled, confidentiality of evaluation report, Section 1955, Probate Code.

Strawberry marketing information, confidentiality of, Section 63124, Food and Agricultural Code.

Structural pest control licensee records relating to pesticide use, confidentiality of, Section 15205, Food and Agricultural Code.

Student driver, records of physical or mental condition, confidentiality of, Section 12661, Vehicle Code.

Student, community college, information received by school counselor, confidentiality of, Section 72621, Education Code.

Student, community college, records, limitations on release, Section 76243, Education Code.

Student, community college, record contents, records of administrative hearing to change contents, confidentiality of, Section 76232, Education Code.

Student, sexual assault on private higher education institution campus, confidentiality of information, Section 94385, Education Code.

Student, sexual assault on public college or university, confidentiality of information, Section 67385, Education Code.

Sturgeon egg processors, records, Section 10004, Fish and Game Code.

*(Amended by Stats. 2009, Ch. 584, Sec. 21. Effective January 1, 2010.)*

**6276.44.** Taxpayer information, confidentiality, local taxes, subdivision (i), Section 6254.

Tax preparer, disclosure of information obtained in business of preparing tax returns, Section 17530.5, Business and Professions Code.

Teacher, credential holder or applicant, information provided to Commission on Teacher Credentialing, confidentiality of, Section 44341, Education Code.

Teacher, certified school personnel examination results, confidentiality of, Section 44289, Education Code.

Telephone answering service customer list, trade secret, Section 16606, Business and Professions Code.

Timber yield tax, disclosure to county assessor, Section 38706, Revenue and Taxation Code.

Timber yield tax, disclosure of information, Section 38705, Revenue and Taxation Code.

Title insurers, confidentiality of notice of noncompliance, Section 12414.14, Insurance Code.

Tobacco products, exemption from disclosure for distribution information provided to the State Department of Public Health, Section 22954, Business and Professions Code.

Tow truck driver, information in records of California Highway Patrol, Department of Motor Vehicles, or other agencies, confidentiality of, Sections 2431 and 2432.3, Vehicle Code.

Toxic substances, Department of, inspection of records of, Section 25152.5, Health and Safety Code.

Trade secrets, Section 1060, Evidence Code.

Trade secrets, confidentiality of, occupational safety and health inspections, Section 6322, Labor Code.

Trade secrets, disclosure of public records, Section 3426.7, Civil Code.

Trade secrets, food, drugs, cosmetics, nondisclosure, Sections 110165 and 110370, Health and Safety Code.

Trade secrets, protection by Director of the Department of Pesticide Regulation, Section 6254.2.

Trade secrets and proprietary information relating to pesticides, confidentiality of, Sections 14022 and 14023, Food and Agricultural Code.

Trade secrets, protection by Director of Industrial Relations, Section 6396, Labor Code.

Trade secrets relating to hazardous substances, disclosure of, Sections 25358.2 and 25358.7, Health and Safety Code.

Traffic violator school licensee records, confidentiality of, Section 11212, Vehicle Code.

Traffic offense, dismissed for participation in driving school or program, record of, confidentiality of, Section 1808.7, Vehicle Code.

Transit districts, questionnaire and financial statement information in bids, Section 99154, Public Utilities Code.

Tribal-state gaming contracts, exemption from disclosure for records of an Indian tribe relating to securitization of annual payments, Section 63048.63.

Trust companies, disclosure of private trust confidential information, Section 1582, Financial Code.

*(Amended by Stats. 2009, Ch. 584, Sec. 22. Effective January 1, 2010.)*

**§276.49.** Unclaimed property, Controller records of, disclosure, Section 1582, Code of Civil Procedure.

Unemployment compensation, disclosure of confidential information, Section 2111, Unemployment Insurance Code.

Unemployment compensation, information obtained in administration of code, Section 1094, Unemployment Insurance Code.

Unemployment fund contributions, publication of annual tax paid, Section 989, Unemployment Insurance Code.

University of California, exemption from disclosure for information submitted by bidders for award of best value contracts, Section 10506.6, Public Contract Code.

Unsafe working condition, confidentiality of complainant, Section 6309, Labor Code.

Use fuel tax information, disclosure prohibited, Section 9255, Revenue and Taxation Code.

Utility systems development, confidential information, subdivision (e), Section 6254.

Utility user tax return and payment records, exemption from disclosure, Section 7284.6, Revenue and Taxation Code.

Vehicle registration, confidentiality of information, Section 4750.4, Vehicle Code.

Vehicle accident reports, disclosure of, Sections 16005, 20012, and 20014, Vehicle Code and Section 27177, Streets and Highways Code.

Vehicular offense, record of, confidentiality five years after conviction, Section 1807.5, Vehicle Code.

Veterans Affairs, Department of, confidentiality of records of contract purchasers, Section 85, Military and Veterans Code.

Veterinarian or animal health technician, alcohol or dangerous drugs diversion and rehabilitation records, confidentiality of, Section 4871, Business and Professions Code.

Victims' Legal Resource Center, confidentiality of information and records retained, Section 13897.2, Penal Code.

Voter, registration by confidential affidavit, Section 2194, Elections Code.

Voter registration card, confidentiality of information contained in, Section 6254.4.

Voting, secrecy, Section 1050, Evidence Code.

Wards and dependent children, inspection of juvenile court documents, Section 827, Welfare and Institutions Code.

*(Amended by Stats. 2009, Ch. 584, Sec. 23. Effective January 1, 2010.)*

**§276.48.** Wards, petition for sealing records, Section 781, Welfare and Institutions Code.

Winegrowers of California Commission, confidentiality of producers' or vintners' proprietary information, Sections 74655 and 74955, Food and Agricultural Code.

Workers' Compensation Appeals Board, injury or illness report, confidentiality of, Section 6412, Labor Code.

Workers' compensation insurance, dividend payment to policyholder, confidentiality of information, Section 11739, Insurance Code.

Workers' compensation insurance fraud reporting, confidentiality of information, Section 1877.4, Insurance Code.

Workers' compensation insurer or rating organization, confidentiality of notice of noncompliance, Section 11754, Insurance Code.

Workers' compensation insurer, rating information, confidentiality of, Section 11752.7, Insurance Code.

Workers' compensation, notice to correct noncompliance, Section 11754, Insurance Code.

Workers' compensation, release of information to other governmental agencies, Section 11752.5, Insurance Code.

Workers' compensation, self-insured employers, confidentiality of financial information, Section 3742, Labor Code.

Workplace inspection photographs, confidentiality of, Section 6314, Labor Code.

Youth Authority, parole revocation proceedings, confidentiality of, Section 1767.6, Welfare and Institutions Code.

Youth Authority, release of information in possession of Youth Authority for offenses under Sections 676, 1764.1, and 1764.2, Welfare and Institutions Code.

*(Amended by Stats. 2009, Ch. 584, Sec. 24. Effective January 1, 2010.)*



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## CODE OF CIVIL PROCEDURE - CCP

PART 4. MISCELLANEOUS PROVISIONS [1855 - 2107] (*Heading of Part 4 amended by Stats. 1965, Ch. 289.*)TITLE 1. OF THE GENERAL PRINCIPLES OF EVIDENCE [1855 - 1866] (*Title 1 enacted 1872.*)

**1855.** When any map which has been recorded in the office of the recorder of any county is injured, destroyed, lost, or stolen, any person interested may file in the superior court of the county in which the map was originally filed or recorded a verified petition in writing alleging that the map has been injured, destroyed, lost, or stolen without fault of the person making the application, and that the petitioner has a true and correct copy of the original map which he or she offers for record in the place of the original map. The petition shall be accompanied by a copy of the true copy offered for recording.

Upon the filing of the petition the clerk shall set it for hearing by the court, and give notice of the hearing by causing notice of the time and place of the hearing to be posted at the courthouse in the county where the court is held at least 10 days prior to the hearing. A copy of the petition and a copy of the true copy offered for record shall be served upon the recorder of the county in which the proceedings are brought at least 10 days prior to the hearing. The court may order any further notice to be given as it deems proper. At the time set for the hearing the court shall take evidence for and against the petition, and if it appears to the court from the evidence presented that the copy of the map submitted is a true copy of the original map, it shall decree that the copy is a true copy of the original map, and order the copy placed of record in the office of the recorder in the place of the original map.

A certified copy of the decree shall accompany the true copy of the map for record. When presented to the county recorder for record, he or she shall place of record the copy of the map in the place of the original map.

When placed of record the copy shall have the same effect as the original map, and conveyances of property referring to the original map shall have the same effect as though the original map had not been injured, destroyed, lost, or stolen, and conveyances thereafter made referring to the copy of the original map shall be deemed to refer also to the original map.

(*Added by renumbering Section 1855b by Stats. 1987, Ch. 56, Sec. 23.*)

**1856.** (a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement.

(b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement.

(c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance.

(d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to the terms included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement.

(e) Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue.

(f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue.

(g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.

(h) As used in this section, "agreement" includes trust instruments, deeds, wills, and contracts between parties.

(*Amended by Stats. 2013, Ch. 81, Sec. 1. Effective January 1, 2014.*)

**1857.** The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place.

(*Enacted 1872.*)

**1858.** In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

(*Enacted 1872.*)

**1859.** In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

(*Enacted 1872.*)

1860. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret.

*(Enacted 1872.)*

1861. The terms of a writing are presumed to have been used in their primary and general acceptance, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.

*(Enacted 1872.)*

1862. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.

*(Enacted 1872.)*

1864. When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

*(Enacted 1872.)*

1865. A written notice, as well as every other writing, is to be construed according to the ordinary acceptance of its terms. Thus a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment and the same refused, and that the holder looks for payment to the person to whom the notice is given.

*(Enacted 1872.)*

1866. When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right, and the other against it, the former is to be adopted.

*(Enacted 1872.)*

Part

San Francisco Administrative Code

## CHAPTER 12M: PROTECTION OF PRIVATE INFORMATION \*

- Sec. 12M.1. Definitions.
- Sec. 12M.2. Nondisclosure of Private Information.
- Sec. 12M.3. Enforcement.
- Sec. 12M.4. Contract Requirements.
- Sec. 12M.5. Exceptions.
- Sec. 12M.6. Preemption.
- Sec. 12M.7. Severability.
- Sec. 12M.8. Amendment by the Board of Supervisors.

### SEC. 12M.1. DEFINITIONS.

For the purposes of this Chapter, the following definitions shall apply to the terms use herein.

- (a) "City" shall mean the City and County of San Francisco.
- (b) "Contract" shall mean an agreement for goods or services, including without limitation agreements for public works or improvements, or grant agreements (1) to be purchased or provided, at the expense of the City and County or to be paid out of moneys deposited in the treasury or out of trust moneys under the control of or collected by the City and County or (2) which grants the Contractor the right to receive revenues from sources other than the City based on its services under the agreement.
- (c) "Contractor" shall mean any person or persons, associations, cooperatives, firm, partnership, corporation, trustee, trustee in bankruptcy, receiver, or combination thereof, who submits a Bid or Proposal or enters into a Contract with the City and County.
- (d) "Contracting Department" shall mean the department that recommends or requests that a Contract be executed by the Office of Contract Administration, the Department of Public Works, or other department or public official authorized to execute the contract on the department's behalf.
- (e) "Private Information" shall mean any information that (1) could be used to identify an individual, including without limitation name, address, social security number, medical information, financial information, date and location of birth, and names of relative; or (2) the law forbids any person from disclosing.
- (f) "Subcontractor" shall mean any person or persons, association, cooperative, firm, partnership, corporation, trustee, trustee in bankruptcy, receiver, or combination thereof, including without limitation any subcontractor, subconsultant or supplier at any tier, that has an arrangement or agreement, directly or indirectly, with a Contractor to perform any of Contractor's obligations under the Contract.

(Added by Proposition D, 11/7/2006)

### SEC. 12M.2. NONDISCLOSURE OF PRIVATE INFORMATION.

- (a) The City shall not disclose Private Information to any person or entity unless specifically authorized to do so by the subject individual or by Contract or where required by Federal or State law or judicial order. The City shall not enter into any Contract for the primary purpose of disclosing Private Information and shall not receive any compensation for the disclosure of Private Information.
- (b) No Contractor or Subcontractor who receives Private Information from the City in the performance of a Contract may disclose that information to a Subcontractor or any other person or entity, unless the Contract authorizes the disclosure, the Contractor has first received written approval from the Contracting Department to disclose the information, or the disclosure is expressly required by judicial order. The disclosure and the use of the information shall be in accordance with any conditions or restrictions stated in the Contract or the Contracting Department's approval and shall not be used except as necessary in the performance of the obligations under the Contract. The department head or the department head's designee shall sign any approvals of the Contracting Department.

(Added by Proposition D, 11/7/2006)

### SEC. 12M.3. ENFORCEMENT.

Any failure of a Contractor to comply with the requirements of Section 12M.2 of this Chapter shall be a material breach of the Contract. In such an event, in addition to any other remedies available to it under equity or law, the City may terminate the Contract, bring a false claim action against the Contractor pursuant to Chapter 6 or Chapter 21 of the Administrative Code, or debar the Contractor.

(Added by Proposition D, 11/7/2006)

### SEC. 12M.4. CONTRACT REQUIREMENTS.

All Contracts and amendments to Contracts entered into after ninety days after the effective date of this Chapter shall incorporate by reference the provisions of Sections 12M.2 and 12M.3 of this Chapter.

(Added by Proposition D, 11/7/2006)

### SEC. 12M.5. EXCEPTIONS.

This Chapter shall not apply in the following circumstances:

- (a) When a Contract involves the expenditure of funds received by the City and County to the extent the application of the Chapter would violate or be inconsistent with the terms or conditions of the applicable grant agreement, subvention or agreement or the instructions of an authorized representative of any such agency with respect to any such grant agreement, subvention or agreement.

(b) When a Contract is for the purchase, sale, transfer or lease of any interest in real property or a license or permit for the use of real property.

(Added by Proposition D, 11/7/2004)

#### SEC. 12M.6. PREEMPTION.

Nothing in this Chapter shall be interpreted or applied so as to create any power or duty in conflict with any Federal or State law.

(Added by Proposition D, 11/7/2004)

#### SEC. 12M.7. SEVERABILITY.

If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provisions to other persons or circumstances, shall not be affected by such holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

(Added by Proposition D, 11/7/2004)

#### SEC. 12M.8. AMENDMENT BY THE BOARD OF SUPERVISORS.

The Board of Supervisors may amend this Chapter to ensure the protection of Private Information with a two-thirds vote.

(Added by Proposition D, 11/7/2004)

#### Notes

- \*Editor's note  
Proposition D, approved November 7, 2004, repealed former Ch. 12M, in its entirety, and created provisions designated as a new Ch. 12M to read as herein set out. Former Ch. 12M was entitled, "Non-disclosure of Private Information."

## Provisions of the Sunshine Ordinance - Section 67

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Sec. 67.1 Findings and Purpose.

The Board of Supervisors and the People of the City and County of San Francisco find and declare:

- (a) Government's duty is to serve the public, reaching its decisions in full view of the public.
- (b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.
- (c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.
- (d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other public interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to protect public officials from abusing their authority.
- (e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force, can protect the public's interest in open government.
- (f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.
- (g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process. (Added by Ord. 286-93, App. 8/18/93; amended by Proposition C, 11/2/99)

Sec. 67.2. Citation.

This Chapter may be cited as the San Francisco Sunshine Ordinance. (Added by Ord. 286-93, App. 8/18/93; amended by Proposition C, 11/2/99)

Sec. 67.3. Definitions.

Whenever in this Article the following words or phrases are used, they shall have the following meanings:

- (a) "City" shall mean the City and County of San Francisco.
- (b) "Meeting" shall mean any of the following:
  - (i) A congregation of a majority of the members of a policy body at the same time and place;
  - (ii) A series of gatherings, each of which involves less than a majority of a policy body, to hear, discuss or deliberate upon any item that is within the subject matter jurisdiction of the City, if the cumulative result

is that a majority of members has become involved in such gatherings; or

(g) any other use of personal intermediaries or communications media that could permit a majority of the members of a policy body to become aware of an item of business and of the views or positions of other members with respect thereto, and to negotiate consensus thereupon.

(4) "Meeting" shall not include any of the following:

(A) Individual contacts or conversations between a member of a policy body and another person that do not convey to the member the views or positions of other members upon the subject matter of the contact or conversation and in which the member does not solicit or encourage the restatement of the views of the other members;

(B) The attendance of a majority of the members of a policy body at a regional, statewide or national conference, or at a meeting organized to address a topic of local community concern and open to the public, provided that a majority of the members refrain from using the occasion to collectively discuss the topic of the gathering or any other business within the subject matter jurisdiction of the City; or

(C) The attendance of a majority of the members of a policy body at a purely social, recreational or ceremonial occasion other than one sponsored or organized by or for the policy body itself, provided that a majority of the members refrain from using the occasion to discuss any business within the subject matter jurisdiction of this body. A meal gathering of a policy body before, during or after a business meeting of the body is part of that meeting and shall be conducted only under circumstances that permit public access to hear and observe the discussion of members. Such meetings shall not be conducted to restaurants or other accommodations where public access is possible only in consideration of making a purchase or some other payment of value.

(D) Proceedings of the Department of Social Services Child Welfare Placement and Review Committee or similar committees which exist to consider confidential information and make decisions regarding Department of Social Services clients.

(c) "Passive meeting body" shall mean:

(1) Advisory committees created by the initiative of a member of a policy body, the Mayor, or a department head;

(2) Any group that meets to discuss with or advise the Mayor or any Department Head on fiscal, economic, or policy issues;

(3) Social, recreational or ceremonial occasions sponsored or organized by or for a policy body to which a majority of the body has been invited.

(4) "Passive meeting body" shall not include a committee that consists solely of employees of the City and County of San Francisco created by the initiative of a member of a policy body, the Mayor, or a department head;

(5) Notwithstanding the provisions of paragraph (4) above, "Passive meeting body" shall include a committee that consists solely of employees of the City and County of San Francisco when such committee is reviewing, developing, modifying, or creating city policies or procedures relating to the public health, safety, or welfare or relating to services for the homeless;

(d) "Policy Body" shall mean:

(1) The Board of Supervisors;

(2) Any other board or commission enumerated in the charter;

(3) Any board, commission, committee, or other body created by ordinance or resolution of the Board of Supervisors;

(4) Any advisory board, commission, committee or body, created by the initiative of a policy body;

(5) Any standing committee of a policy body irrespective of its composition.

(6) "Policy Body" shall not include a committee which consists solely of employees of the City and County of San Francisco, unless such committee was established by charter or by ordinance or resolution of the Board of Supervisors.

(7) Any advisory board, commission, committee, or council created by a federal, state, or local grant whose members are appointed by city officials, employees or agents. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 129-98, App. 4/17/98; Proposition G, 11/2/99)

#### Sec. 67.4. Passive Meetings.

(a) All gatherings of passive meeting bodies shall be accessible to individuals upon inquiry and to the extent possible consistent with the facilities in which they occur.

(b) Such gatherings need not be formally noticed, except on the City's website whenever possible, although the time, place and nature of the gathering shall be disclosed upon inquiry by a member of the public, and any agenda actually prepared for the gathering shall be accessible to such inquirers as a public record.

(c) Such gatherings need not be conducted in any particular space for the accommodation of members of the public, although members of the public shall be permitted to observe on a space available basis consistent with legal and practical restrictions on occupancy.

(d) Such gatherings of a business nature need not provide opportunities for comment by members of the public, although the person presiding may, in his or her discretion, entertain such questions or comments from spectators as may be relevant to the business of the gathering.

(e) Such gatherings of a social or ceremonial nature need not provide refreshments to spectators.

(f) Gatherings subject to this subsection include the following: advisory committees or other multistakeholder bodies created in writing or by the initiative of, or otherwise primarily formed or existing to serve as a non-governmental advisor to, a member of a policy body, the Mayor, the City Administrator, a department head, or any elective officer, and social, recreational or ceremonial occasions sponsored or organized by or for a policy body to which a majority of the body has been invited. This subsection shall not apply to a committee which consists solely of employees of the City and County of San Francisco.

(g) Gatherings defined in subdivision (f) may hold closed sessions under circumstances allowed by this Article.

(h) To the extent not inconsistent with state or federal law, a policy body shall include in any contract with an entity that owns, operates or manages any property in which the City has or will have an ownership interest, including a mortgage, and on which the entity performs a government function related to the furtherance of health, safety or welfare, a requirement that any meeting of the governing board of the entity to address any matter relating to the property or its government-related activities on the property, or performance under the contract or grant, be conducted as provided in subdivision (a) of this section. Records made available to the governing board relating to such matters shall be likewise available to the public, at a cost not to exceed the actual cost up to ten cents per page, or at a higher actual cost as demonstrated in writing to such governing board. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 287-94, App. 7/12/94; Proposition G, 11/2/99)

#### Sec. 67.5. Meetings To Be Open And Public; Application Of Brown Act.

All meetings of any policy body shall be open and public, and governed by the provisions of the Ralph M. Brown Act (Government Code Sections 54950 et. seq.) and of this article. In case of inconsistent requirements under the Brown Act and this article, the requirement which would result in greater or more expedient public access shall apply. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

#### Sec. 67.6. Conduct Of Business; Time And Place For Meetings.

(a) Each policy body, except for advisory bodies, shall observe by resolution or motion the time and place for holding regular meetings.

(b) Unless otherwise required by state or federal law or necessary to inspect real property or personal property which cannot be conveniently brought within the territory of the City and County of San Francisco or to meet with residents residing on property owned by the City, or to meet with residents of another jurisdiction to discuss actions of the policy body that affect those residents, all meetings of its policy bodies shall be held within the City and County of San Francisco.

(c) If a regular meeting would otherwise fall on a holiday, it shall instead be held on the next business day, unless otherwise rescheduled in advance.

(d) If, because of fire, flood, earthquake or other emergency, it would be unsafe to meet at the regular meeting place, meetings may be held for the duration of the emergency at some other place specified by the policy body. The change of meeting site shall be announced, by the most rapid means of communication available at the time, in a notice to the local media who have requested written notice of special meetings pursuant to Government Code Section 54955. Reasonable attempts shall be made to contact others regarding the change in meeting location.

(e) Meetings of passive meeting bodies as specified in Section 67.4(d)(4) of this article shall be preceded by notice delivered personally or by mail, e-mail, or facsimile as reasonably requested at least 72 hours before the time of such meeting to each person who has requested, in writing, notice of such meeting. If the advisory body elects to hold regular meetings, it shall provide by bylaws, or whatever other rule is utilized by that advisory body for the conduct of its business, for the time and place for holding such regular meetings. In such case, no notice of regular meetings, other than the posting of an agenda pursuant to Section 67.7 of this article in the place used by the policy body which is advised, is required.

(f) Special meetings of any policy body, including advisory bodies that choose to establish regular meeting times, may be called at any time by the presiding officer thereof or by a majority of the members thereof, by delivering personally, or by mail written notice to each member of such policy body and the local media who have requested written notice of special meetings in writing. Such notice of a special meeting shall be delivered as described in (e) at least 72 hours before the time of such meeting as specified in the notice. The notice shall specify the time and place of the special meeting and the business to be transacted. No other business shall be considered at such meetings. Such written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the presiding officer or secretary of the body or commission a written waiver of notice. Such waiver may be given by telegram. Such written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. Each special meeting shall be held at the regular meeting place of the policy body except that the policy body may designate an alternate meeting place provided that such alternate

location is specified in the notice of the special meeting; further provided that the notice of the special meeting shall be given at least 15 days prior to said special meeting being held at an alternate location. This provision shall not apply where the alternative meeting location is located within the same building as the regular meeting place.

(g) If a meeting must be canceled, continued or rescheduled for any reason, notice of such change shall be provided to the public as soon as is reasonably possible, including posting of a cancellation notice in the same manner as described in section 67.7(c), and mailed notice if sufficient time permits. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

#### Sec. 67.7. Agenda Requirements; Regular Meetings.

(a) At least 72 hours before a regular meeting, a policy body shall post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement of the item for discussion only. In addition, a policy body shall post a current agenda on its Internet site at least 72 hours before a regular meeting.

(b) A description is meaningful if it is sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English. It shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted adjacent to the agenda or, if such documents are of more than one page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours.

(c) The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public.

(d) No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a policy body may respond to statements made or questions posed by persons exercising their public testimony rights, to the extent of asking a question for clarification, providing a reference to staff or other resources for factual information, or requesting staff to report back to the body at a subsequent meeting concerning the matter raised by such testimony.

(e) Notwithstanding subdivision (d), the policy body may take action on items of business not appearing on the posted agenda under any of the following conditions:

(1) Upon a determination by a majority vote of the body that an accident, natural disaster or work force disruption poses a threat to public health and safety.

(2) Upon a good faith, reasonable determination by a two-thirds vote of the body, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that (A) the need to take immediate action on the item is so imperative as to threaten serious injury to the public interest if action were deferred to a subsequent special or regular meeting, or relates to a purely commemorative action, and (B) that the need for such action came to the attention of the body subsequent to the agenda being posted as specified in subdivision (a).

(3) The item was on an agenda posted pursuant to subdivision (a) for a prior meeting of the body occurring not more than five calendar days prior to the date action is taken on the item, and at the prior meeting the item was continued to the meeting at which action is being taken.

(f) Each board and commission enumerated in the charter shall ensure that agendas for regular and special meetings are made available to speech and hearing impaired persons through telecommunications devices for the deaf, telecommunications relay services or equivalent systems, and, upon request, to sight impaired persons through Braille or enlarged type.

(g) Each policy body shall ensure that notices and agendas for regular and special meetings shall include the following notice:

#### KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE

(Chapter 67 of the San Francisco Administrative Code)

Government's duty is to serve the public, reaching its decisions in full view of the public.

Commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

#### FOR MORE INFORMATION

ON YOUR RIGHTS UNDER THE SUNSHINE  
ORDINANCE OR TO REPORT A VIOLATION  
OF THE ORDINANCE, CONTACT THE  
SUNSHINE ORDINANCE TASK FORCE.

(h) Each agenda of a policy body covered by this Sunshine Ordinance shall include the address, area code and phone number, fax number, e-mail address, and a contact person's name for the Sunshine Ordinance Task Force. Information on how to obtain a free copy of the Sunshine Ordinance shall be included on each agenda. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 292-95, App. 9/18/95; Ord. 285-96, App. 5/8/96; Proposition G, 11/2/99)

#### Sec. 67.7-1. Public Notice Requirements.

(a) Any public notice that is mailed, posted or published by a City department, board, agency or commission to residents residing within a specific area to inform those residents of a matter that may impact their property or that neighborhood area, shall be brief, concise and written in plain, easily understood English.

(b) The notice should inform the residents of the proposal or planned activity, the length of time planned for the activity, the effect of the proposal or activity, and a telephone contact for residents who have questions.

(c) If the notice informs the public of a public meeting or hearing, then the notice shall state that persons who are unable to attend the public meeting or hearing may submit to the City, by the time the proceeding begins, written comments regarding the subject of the meeting or hearing, that these comments will be made a part of the official public record, and that the comments will be brought to the attention of the person or persons conducting the public meeting or hearing. The notice should also state the name and address of the person or persons to whom those written comments should be submitted. (Added by Ord. 185-96, App. 5/8/96; amended by Proposition G, 11/2/99)

#### Sec. 67.8. Agenda Disclosures: Closed Sessions.

(a) In addition to the brief general description of items to be discussed or acted upon in open and public session, the agenda posted pursuant to Government Code Section 54954.3, any mailed notice given pursuant to Government Code Section 54954.1, and any call and notice delivered to the local media and posted pursuant to Government Code Section 54956 shall specify and disclose the nature of any closed sessions by providing all of the following information:

(1) With respect to a closed session held pursuant to Government Code Section 54956.7:

#### LICENSE/PERMIT DETERMINATION:

applicant(s)

The space shall be used to specify the number of persons whose applications are to be reviewed.

(2) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54956.8:

#### CONFERENCE WITH REAL PROPERTY NEGOTIATOR

Property:

Person(s) negotiating:

Under negotiation:

Price/Term of payment: Both:

The space under "Property" shall be used to list an address, including cross streets where applicable, or other description or name which permits a reasonably ready identification of each parcel or structure subject to negotiation. The space under "Person(s) negotiating" shall be used to identify the person or persons with whom negotiations concerning that property are in progress. The spaces under "Under negotiation" shall be checked off as applicable to indicate which issues are to be discussed.

(3) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54956.9, either:

#### CONFERENCE WITH LEGAL COUNSEL

Existing litigation:

Unspecified to protect service of process

Unspecified to protect settlement posture

or:

**CONFERENCE WITH LEGAL COUNSEL****Anticipated litigation:****As defendant As plaintiff**

The space under "Existing litigation" shall be used to specifically identify a case under discussion pursuant to subdivision (a) of Government Code Section 54956.9, including the case name, court, and case number, unless the identification would jeopardize the City's ability to effectuate service of process upon one or more unrepresented parties, in which instance the space in the next succeeding line shall be checked, or unless the identification would jeopardize the City's ability to conclude existing settlement negotiations to its advantage, in which instance the space in the next succeeding line shall be checked. If the closed session is called pursuant to subdivision (b) or (c) of Section 54956.9, the appropriate space shall be checked under "Anticipated litigation" to indicate the City's anticipated position as defendant or plaintiff respectively. If more than one instance of anticipated litigation is to be reviewed, space may be saved by entering the number of separate instances in the "As defendant" or "As plaintiff" spaces or both as appropriate.

(a) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54957, either:

**THREAT TO PUBLIC SERVICES OR FACILITIES**

Name, title and agency of law enforcement officer(s) to be conferred with:

Re:

**PUBLIC EMPLOYEE APPOINTMENT/HIRING**

Title/description of position(s) to be filled:

**PUBLIC EMPLOYEE PERFORMANCE EVALUATION**

Position and, in the case of a routine evaluation, name of employee(s) being evaluated:

Or:

**PUBLIC EMPLOYEE DISMISSAL**

Number of employees affected:

Or:

(b) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54957.6, either:

**CONFERENCE WITH NEGOTIATOR—COLLECTIVE BARGAINING**

Name and title of City's negotiator:

Organization(s) representing:

Police officers, firefighters and airport police

Transit Workers

Nurses

Miscellaneous Employees

Miscellaneous issue(s) under negotiation:

Wages

Hours

Benefits

Working Conditions

Other (specify if known)

At:

Where renegotiating a memorandum of understanding or negotiating a successor memorandum of understanding, the name of the memorandum of understanding:

In case of multiple items of business under the same category, lines may be added and the location of information may be reformatting to eliminate unnecessary duplication and space, so long as the relationship of information concerning the same item is reasonably clear to the reader. As an alternative to the inclusion of lengthy lists of names or other information in the agenda, or as a means of adding items to an earlier completed agenda, the agenda may incorporate by reference separately prepared documents containing the required information, so long as copies of those documents are posted adjacent to the agenda within the time periods required by Government Code Sections 54954.2 and 54956 and provided with any mailed or delivered notices required by Sections 54954.1 and 54956. (Added by Ord. 265-93, App. 8/18/99; amended by Proposition G, 11/2/99)

**Sec. 67.8-1. Additional Requirements for Closed Sessions.**

(a) All closed sessions of any policy body covered by this Ordinance shall be either audio recorded or audio and video recorded in their entirety and all such recordings shall be retained for at least TEN years, or permanently where technologically and economically feasible. Closed session recordings shall be made available whenever all rationales for closing the session are no longer applicable. Recordings of closed sessions of a policy body covered by this Ordinance, wherein the justification for the closed session is due to "anticipated litigation" shall be released to the public in accordance with any of the following provisions: TWO years after the meeting if no litigation is filed; UPON EXPIRATION of the statute of limitations for the anticipated litigation if no litigation is filed; as soon as the controversy leading to anticipated litigation is settled or concluded.

(b) Each agenda item for a policy body covered by this ordinance that involves existing litigation shall identify the court, case number, and date the case was filed on the written agenda. For each agenda item for a group covered by this ordinance that involves anticipated litigation, the City Attorney's Office or the policy body shall disclose at any time requested and to any member of the public whether such anticipated litigation developed into litigation and shall identify the court, case number, and date the case was filed. (Added by Proposition G, 11/2/99)

**Sec. 67.9. Agendas And Related Materials: Public Records.**

(a) Agendas of meetings and any other documents on file with the clerk of the policy body, when intended for distribution to all, or a majority of all, of the members of a policy body in connection with a matter anticipated for discussion or consideration at a public meeting shall be made available to the public. To the extent possible, such documents shall also be made available through the policy body's Internet site. However, this disclosure need not include any material exempt from public disclosure under this ordinance.

(b) Records which are subject to disclosure under subdivision (a) and which are intended for distribution to a policy body prior to commencement of a public meeting shall be made available for public inspection and copying upon request prior to commencement of such meeting, whether or not actually distributed to or received by the body at the time of the request.

(c) Records which are subject to disclosure under subdivision (a) and which are distributed during a public meeting but prior to commencement of their discussion shall be made available for public inspection prior to commencement of, and during, their discussion.

(d) Records which are subject to disclosure under subdivision (a) and which are distributed during their discussion at a public meeting shall be made available for public inspection immediately or as soon thereafter as is practicable.

(e) A policy body may charge a duplication fee of one cent per page for a copy of a public record prepared for consideration at a public meeting, unless a special fee has been established pursuant to the procedure set forth in Section 67.38(d). Neither this section nor the California Public Records Act (Government Code sections 6250 et seq.) shall be construed to limit or delay the public's right to inspect any record required to be disclosed by that act, whether or not distributed to a policy body. (Added by Ord. 265-93, App. 8/18/99; amended by Proposition G, 11/2/99)

**Sec. 67.10. Closed Sessions: Permitted Topics.**

A policy body may, but is not required to, hold closed sessions:

(a) With the Attorney General, district attorney, sheriff, or chief of police, or their respective deputies, on matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or public facilities.

(b) To consider the appointment, employment, evaluation of performance, or dismissal of a City employee, if the policy body has the authority to appoint, employ, or dismiss the employee, or to hear complaints or charges brought against the employee by another person or employee unless the employee complained of requests a public hearing. The body may exclude from any such public meeting, and shall exclude

from any such closed meeting, during the comments of a complainant, any or all other complainants in the matter. The term "employees" as used in this section shall not include any elected official, member of a policy body or applicant for such a position, or person providing services to the City as an independent contractor or the employee thereof, including but not limited to independent attorneys or law firms providing legal services to the City for a fee rather than a salary.

(c) Notwithstanding section (b), an Executive Compensation Committee established pursuant to a Memorandum of Understanding with the Municipal Executives Association may meet in closed session when evaluating the performance of an individual officer or employee subject to that Memorandum of Understanding or when establishing performance goals for such an officer or employee where the setting of such goals requires discussion of that individual's performance.

(d) Based on advice of its legal counsel, and on a motion and vote in open session to assert the attorney-client privilege, to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would likely and unavoidably prejudice the position of the City in that litigation. Litigation shall be considered pending when any of the following circumstances exist:

(i) An adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator, to which the City is a party, has been initiated formally or,

(ii) A point has been reached where, in the opinion of the policy body on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the City, or the body is meeting only to decide whether a closed session is authorized pursuant to that advice or, based on those facts and circumstances, the body has decided to initiate or is deciding whether to initiate litigation.

(g) A closed session may not be held under this section to consider the qualifications or engagement of an independent contract attorney or law firm, for litigation services or otherwise.

(h) With the City's designated representatives regarding matters within the scope of collective bargaining or meeting and conferring with public employee organizations when a policy body has authority over such matters.

(i) Such closed sessions shall be for the purpose of reviewing the City's position and instructing its designated representatives and may take place solely prior to and during active consultations and discussions between the City's designated representatives and the representatives of employee organizations or the unrepresented employees. A policy body shall not discuss compensation or other contractual matters in closed session with one or more employees directly interested in the outcome of the negotiations.

(a) In addition to the closed sessions authorized by subsection 67.10(c)(4), a policy body subject to Government Code Section 3304 may hold closed sessions with its designated representatives on mandatory subjects within the scope of representation of its represented employees, as determined pursuant to Section 3304. (Added by Ord. 265-93, App. 8/18/93, amended by Ord. 37-98, App. 1/23/98; Proposition C, 11/2/99)

#### Sec. 67.11. Statement Of Reasons For Closed Sessions.

Prior to any closed session, a policy body shall state the general reason or reasons for the closed session, and shall cite the statutory authority, including the specific section and subdivision, or other legal authority under which the session is being held. In the closed session, the policy body may consider only those matters covered in its statement. In the case of regular and special meetings, the statement shall be made in the form of the agenda disclosures and specifications required by Section 67.8 of this article. In the case of adjourned and continued meetings, the statement shall be made with the same disclosures and specifications required by Section 67.8 of this article, as part of the notice provided for the meeting.

In the case of an item added to the agenda as a matter of urgent necessity, the statement shall be made prior to the determination of urgency and with the same disclosures and specifications as if the item had been included in the agenda pursuant to Section 67.8 of this article. Nothing in this section shall require or authorize a disclosure of information prohibited by state or federal law. (Added by Ord. 265-93, App. 8/18/93, amended by Proposition C, 11/2/99)

#### Sec. 67.12. Disclosure Of Closed Session Discussions And Actions.

(a) After every closed session, a policy body may in its discretion and in the public interest, disclose to the public any portion of its discussion that is not confidential under federal or state law, the Charter, or non-waivable privilege. The body shall, by motion and vote in open session, elect either to disclose no information or to disclose the information that a majority deems to be in the public interest. The disclosure shall be made through the presiding officer of the body or such other person, present in the closed session, whom he or she designates to convey the information.

(b) A policy body shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows:

(i) Real Property Negotiations: Approval given to a policy body's negotiator concerning real estate negotiations pursuant to Government Code Section 54968.8 shall be reported as soon as the agreement is final. If any open approval renders the agreement final, the policy body shall report that approval, the substance of the agreement and the vote thereon in open session immediately. If final approval rests with another party to the negotiations, the body shall disclose the fact of that approval, the substance of the agreement and the body's vote or votes thereon upon inquiry by any person, as soon as the other party or its agent has informed the body of its approval. If notwithstanding the final approval there are conditions precedent to the final consummation of the transaction, or there are multiple contiguous or closely located properties that are being considered for acquisition, the document referred to in subdivision (b) of this section need not be disclosed until the condition has been satisfied or the agreement has been reached with respect to all the properties, or both.

(ii) Litigation: Direction or approval given to the body's legal counsel to prosecute, defend or seek or refrain from seeking appellate review or relief, or to otherwise enter as a party, intervenor or amicus curiae in any form of litigation as the result of a consultation pursuant to Government Code Section 54968.9 shall be reported in open session as soon as given, or at the first meeting after an adverse party has been served in the matter if immediate disclosure of the City's intentions would be contrary to the public interest. The report shall identify the adverse party or parties, any co-parties with the City, any existing claim or order to be defended against or any factual circumstances or contractual dispute giving rise to the City's complaint, petition or other litigation initiative.

(iii) Settlement: A policy body shall neither solicit nor agree to any term in a settlement which would preclude the release of the text of the settlement itself and any related documentation communicated to or received from the adverse party or parties. Any written settlement agreement and any documents attached to or referenced in the settlement agreement shall be made publicly available at least 10 calendar days before the meeting of the policy body at which the settlement is to be approved to the extent that the settlement would commit the City or a department thereof to adopting, modifying, or discontinuing an existing policy, practice or program or otherwise acting other than to pay an amount of money less than \$50,000. The agenda for any meeting in which a settlement subject to this section is discussed shall identify the names of the parties, the case number, the court, and the material terms of the settlement. Where the disclosure of documents in a litigation matter that has been settled could be detrimental to the City's interest in pending litigation arising from the same facts or incident and involving a party not a party to or otherwise aware of the settlement, the documents required to be disclosed by subdivision (b) of this section need not be disclosed until the other case is settled or otherwise finally concluded.

(iv) Employee Actions: Action taken to appoint, employ, dismiss, transfer or accept the resignation of a public employee in closed session pursuant to Government Code Section 54967 shall be reported immediately in a manner that names the employee, the action taken and position affected and, in the case of dismissal for a violation of law or of the policy of the City, the reason for dismissal. "Dismissal" within the meaning of this ordinance includes any termination of employment at the will of the employer rather than of the employee, however characterized. The proposed terms of any separation agreement shall be immediately disclosed as soon as presented to the body, and its final terms shall be immediately disclosed upon approval by the body.

(v) Collective Bargaining: Any collectively bargained agreement shall be made publicly available at least 15 calendar days before the meeting of the policy body to which the agreement is to be reported.

(f) Reports required to be made immediately may be made orally or in writing, but shall be supported by copies of any contracts, settlement agreements, or other documents related to the transaction that were finally approved or adopted in the closed session and that embody the information required to be disclosed immediately shall be provided to any person who has made a written request regarding that item following the posting of the agenda, or who has made a standing request for all such documentation as part of a request for notice of meetings pursuant to Government Code Sections 54964.1 or 54968.

(g) A written summary of the information required to be immediately reported pursuant to this section, or documents embodying that information, shall be posted by the close of business on the next business day following the meeting, in the place where the meeting agenda of the body are posted. (Added by Ord. 265-93, App. 8/18/93, amended by Proposition C, 11/2/99)

#### Sec. 67.13. Barriers To Attendance Prohibited.

(a) No policy body shall conduct any meeting, conference or other function in any facility that excludes persons on the basis of actual or presumed class identity or characteristics, or which is inaccessible to persons with physical disabilities, or where members of the public may not be present without making a payment or purchase. Whenever the Board of Supervisors, a board or commission enumerated in the charter, or any committee thereof anticipates that the number of persons attending the meeting will exceed the legal capacity of the meeting room, any public address system used to amplify sound in the meeting room shall be extended by supplementary speakers to permit the overflow audience to listen to the proceedings in an adjacent room or passageway, unless such supplementary speakers would disrupt the operation of a City office.

(b) Each board and commission enumerated in the charter shall provide sign language interpreters or note-takers at each regular meeting, provided that a request for such services is communicated to the secretary or clerk of the board or commission at least 48 hours before the meeting, except for Monday meetings, for which the deadline shall be 4 p.m. of the last business day of the preceding week.

(c) Each board and commission enumerated in the charter shall ensure that accessible seating for persons with disabilities, including those using wheelchairs, is made available for each regular and special meeting.

(d) Each board and commission enumerated in the charter shall include on the agenda for each regular and special meeting the following statement: "In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals."

(e) The Board of Supervisors shall seek to provide translators at each of its regular meetings and all meetings of its committees for each language requested, where the translation is necessary to enable San

San Francisco residents with limited English proficiency to participate in the proceedings provided that a request for such translation services is communicated to the Clerk of the Board of Supervisors at least 48 hours before the meeting. For meetings on a Monday or a Tuesday, the request must be made by noon of the last business day of the preceding week. The Clerk of the Board of Supervisors shall first solicit volunteers from the ranks of City employees and/or from the community to serve as translators. If volunteers are not available the Clerk of the Board of Supervisors may next solicit translators from non-profit agencies, which may be compensated. If these options do not provide the necessary translation services, the Clerk may employ professional translators. The unavailability of a translator shall not affect the ability of the Board of Supervisors or its committees to deliberate or vote upon any matter presented to them. In any calendar year in which the costs to the City for providing translator services under this subsection exceeds \$20,000, the Board of Supervisors shall, as soon as possible thereafter, renew the provisions of this subsection. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 292-95, App. 9/8/95; Ord. 489-96, App. 12/20/96; Proposition G, 11/2/99)

Sec. 67-14. Video and Audio Recording, Filming And Still Photography.

(a) Any person attending an open and public meeting of a policy body shall have the right to record the proceedings with an audio or video recorder or a still or motion picture camera, or to broadcast the proceedings, in the absence of a reasonable finding of the policy body that the recording or broadcast cannot continue without such noise, illumination or obstruction of view as to constitute a persistent disruption of the proceedings.

(b) Each board and commission enumerated in the charter shall audio record each regular and special meeting. Each such audio recording, and any audio or video recording of a meeting of any other policy body made at the direction of the policy body shall be a public record subject to inspection pursuant to the California Public Records Act (Government Code Section 6250 et seq.), and shall not be erased or destroyed. Inspection of any such recording shall be provided without charge on an appropriate play back device made available by the City. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

(c) Every City policy body, agency or department shall audio or video record every noticed regular meeting, special meeting, or hearing open to the public held in a City Hall hearing room that is equipped with audio or video recording facilities, except to the extent that such facilities may not be available for technical or other reasons. Each such audio or video recording shall be a public record subject to inspection pursuant to the California Public Records Act (Government Code Section 6250 et seq.), and shall not be erased or destroyed. The City shall make such audio or video recording available in digital form at a centralized location on the City's web site ([www.sfbos.org](http://www.sfbos.org)) within seventy-two hours of the date of the meeting or hearing and for a period of at least two years after the date of the meeting or hearing. Inspection of any such recording shall also be provided without charge on an appropriate play back device made available by the City. This subsection (c) shall not be construed to limit or in any way modify the duties incurred by any other provision of this article, including but not limited to the requirements for recording closed sessions as stated in Section 67-8-1 and for recording meetings of boards and commissions enumerated in the Charter as stated in subsection (b) above. (Added by Ord. 80-08, App. 5/12/08)

Sec. 67-15. Public Testimony.

(a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address a policy body on items of interest to the public that are within policy body's subject matter jurisdiction, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by Section 67-7(c) of this article. However, in the case of a meeting of the Board of Supervisors, the agenda need not provide an opportunity for members of the public to address the Board on any item that has already been considered by a committee, composed exclusively of members of the Board, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the Board.

(b) Every agenda for special meetings at which action is proposed to be taken on an item shall provide an opportunity for each member of the public to directly address the body concerning that item prior to action thereupon.

(c) A policy body may adopt reasonable regulations to ensure that the intent of subdivisions (a) and (b) are carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker. Each policy body shall adopt a rule providing that each person wishing to speak on an item before the body at a regular or special meeting shall be permitted to be heard once for up to three minutes. Time limits shall be applied uniformly to members of the public wishing to testify.

(d) A policy body shall not abridge or prohibit public criticism of the policy, procedures, programs or services of the City, or of any other aspect of its proposals or activities, or of the acts or omissions of the body, on the basis that the performance of one or more public employees is implicated, or on any basis other than reasonable time constraints adopted in regulations pursuant to subdivision (c) of this section.

(e) To facilitate public input, any agenda change or continuances shall be announced by the presiding officer of a policy body at the beginning of a meeting, or as soon thereafter as the change or continuance becomes known to such presiding officer. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67-16. Minutes.

The clerk or secretary of each board and commission enumerated in the charter shall record the minutes for each regular and special meeting of the board or commission. The minutes shall state the time the meeting was called to order, the names of the members attending the meeting, the roll call vote on each matter considered at the meeting, the time the board or commission began and ended any closed session, the names of the members and the names, and titles where applicable, of any other persons attending any closed session, a list of those members of the public who spoke on each matter if the speakers identified themselves, whether such speakers supported or opposed the matter, a brief summary of each person's statement during the public comment period for each agenda item, and the time the meeting was adjourned. Any person speaking during a public comment period may supply a brief written summary of their comments which shall, if no more than 300 words, be included in the minutes.

The draft minutes of each meeting shall be available for inspection and copying upon request no later than ten working days after the meeting. The officially adopted minutes shall be available for inspection and copying upon request no later than ten working days after the meeting at which the minutes are adopted. Upon request, minutes required to be produced by this section shall be made available in Braille or Increased type size. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67-17. Public Comment By Members Of Policy Bodies.

Every member of a policy body retains the full constitutional rights of a citizen to comment publicly on the wisdom or propriety of government actions, including those of the policy body of which he or she is a member. Policy bodies shall not sanction, reprove or deprive members of their rights as elected or appointed officials for expressing their judgments or opinions, including those which deal with the perceived inconsistency of non-public discussions, communications or actions with the requirements of state or federal law or of this ordinance. The release of specific factual information made confidential by state or federal law including, but not limited to, the privilege for confidential attorney-client communications, may be the basis for a request for injunctive or declaratory relief, of a complaint to the Mayor seeking an accusation of misconduct, or both. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67-20. Definitions.

Whenever in this article the following words or phrases are used, they shall mean:

(a) "Department" shall mean a department of the City and County of San Francisco.

(b) "Public Information" shall mean the content of "public records" as defined in the California Public Records Act (Government Code Section 6252), whether provided in documentary form or in an oral communication. "Public Information" shall not include "computer software" developed by the City and County of San Francisco as defined in the California Public Records Act (Government Code Section 6254-9).

(c) "Supervisor of Records" shall mean the City Attorney. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 375, App. 9/30/96; Proposition G, 11/2/99)

(d) 72-13. Process For Gaining Access To Public Records; Administrative Appeals.

(a) Every person having custody of any public record or public information, as defined herein, hereinafter referred to as a custodian of a public record shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.

(b) A custodian of a public record shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

(c) A custodian of a public record shall assist a requester in identifying the existence, form, and nature of any records or information maintained by, available to, or in the custody of the custodian, whether or not the contents of those records are exempt from disclosure and shall, when requested to do so, provide in writing within seven days following receipt of a request, a statement as to the existence, quantity, form and nature of records relating to a particular subject or questions with enough specificity to enable a requester to identify records in order to make a request under (b). A custodian of any public record, when not in possession of the record requested, shall assist a requester in directing a request to the proper office or staff person.

(d) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b), the person making the request may petition the supervisor of records for a determination whether the record requested is public. The supervisor of records shall inform the petitioner, as soon as possible and within 30 days, of its determination whether the record requested, or any part of the record requested, is public. Where requested by the petitioner, and where otherwise desirable, this determination shall be in writing. Upon the determination by the supervisor of records that the record is public, the supervisor of records shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the supervisor of records shall notify the district attorney or the attorney general who shall take whatever measures she or he deems necessary and appropriate to insure compliance with the provisions of this ordinance.

(e) If the custodian refuses, fails to comply, or incompletely complies with a request described in (b) above or if a petition is denied or not acted on by the supervisor of public records, the person making the

request may petition the Sunshine Task Force for a determination whether the record requested is public. The Sunshine Task Force shall inform the petitioner, as soon as possible and within 2 days after its next meeting but in no case later than 45 days from when a petition in writing is received, of its determination whether the record requested, or any part of the record requested, is public. Where requested by the petitioner, and where otherwise desirable, this determination shall be in writing. Upon the determination that the record is public, the Sunshine Task Force shall immediately order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order within 5 days, the Sunshine Task Force shall notify the district attorney or the attorney general who may take whatever measures she or he deems necessary to insure compliance with the provisions of this ordinance. The Board of Supervisors and the City Attorney's office shall provide sufficient staff and resources to allow the Sunshine Task Force to fulfill its duties under this provision. Where requested by the petitioner, the Sunshine Task Force may conduct a public hearing concerning the records request denied. As authorized representative of the custodian of the public records requested shall attend any hearing and explain the basis for its decision to withhold the records requested.

(f) The administrative remedy provided under this article shall in no way limit the availability of other administrative remedies provided to any person with respect to any officer or employee of any agency, executive office, department or board; nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. Its custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this section, the superior court shall have jurisdiction to order compliance.

(g) In any court proceeding pursuant to this article there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

(h) On at least an annual basis, and as otherwise requested by the Sunshine Ordinance Task Force, the supervisor of public records shall prepare a tally and report of every petition brought before it for access to records since the time of its last tally and report. The report shall at least identify for each petition the record or records sought, the custodian of those records, the ruling of the supervisor of public records, whether any ruling was overturned by a court and whether there were orders given to custodians of public records were followed. The report shall also summarize any court actions during that period regarding petitions the Supervisor has decided. At the request of the Sunshine Ordinance Task Force, the report shall also include copies of all rulings made by the supervisor of public records and all opinions issued.

(i) The San Francisco City Attorney's office shall act to protect and secure the rights of the people of San Francisco to access public information and public meetings and shall not act as legal counsel for any city employee or any person having custody of any public record for purposes of denying access to the public. The City Attorney may publish legal opinions in response to a request from any person as to whether a record or information is public. All communications with the City Attorney's Office with regard to this ordinance, including petitions, requests for opinion, and opinions shall be public records.

(j) Notwithstanding the provisions of this section, the City Attorney may defend the City or a City Employee in litigation under this ordinance that is actually filed in court to any extent required by the City Charter or California Law.

(k) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance.

(l) Inspection and copying of documentary public information stored in electronic form shall be made available to the person requesting the information in any form requested which is available to or easily generated by the department, its officer or employees, including disc, tape, printout or monitor at a charge no greater than the cost of the media on which it is duplicated. Inspection of documentary public information on a computer monitor need not be allowed where the information sought is necessarily and inseparably intertwined with information not subject to disclosure under this ordinance. Nothing in this section shall require a department to program or reprogram a computer to respond to a request for information or to release information where the release of that information would violate a licensing agreement or copyright law. (Added by Ord. 266-93, App. 8/18/93; amended by Ord. 253-96, App. 6/19/96; Proposition G, 11/2/99)

Sec. 67-21. Policy Regarding Use And Purchase Of Computer Systems.

(a) It is the policy of the City and County of San Francisco to utilize computer technology in order to reduce the cost of public records management, including the costs of collecting, maintaining, and disclosing records subject to disclosure to members of the public under this section. To the extent that it is technologically and economically feasible, departments that use computer systems to collect and store public records shall program and design these systems to ensure convenient, efficient, and economical public access to records and shall make public records easily accessible over public networks such as the Internet.

(b) Departments purchasing new computer systems shall attempt to reach the following goals as a means to achieve lower costs to the public in connection with the public disclosure of records:

(1) Implementing a computer system in which exemplar information is segregated or filed separately from otherwise disclosable information.

(2) Implementing a system that permits reproduction of electronic copies of records in a format that is generally recognized as an industry standard format.

(3) Implementing a system that permits making records available through the largest non-profit, non-proprietary public computer network, consistent with the requirement for security of information. (Added by Ord. 266-93, App. 8/18/93; amended by Ord. 253-96, App. 6/19/96; Proposition G, 11/2/99)

Sec. 67-22. Release Of Oral Public Information.

Release of oral public information shall be accomplished as follows:

(a) Every department head shall designate a person or persons knowledgeable about the affairs of the department, to provide information, including oral information, to the public about the department's operations, plans, policies and positions. The department head may designate himself or herself for this assignment, but in any event shall arrange that an alternate be available for this function during the absence of the person assigned primary responsibility. If a department has multiple bureaus or divisions, the department may designate a person or persons for each bureau or division to provide this information.

(b) The role of the person or persons so designated shall be to provide information on as timely and responsive a basis as possible to those members of the public who are not requesting information from a specific person. This section shall not be interpreted to outlaw existing informal contacts between employees and members of the public when these contacts are occasional, acceptable to the employee and the department, not disruptive of his or her operational duties and confined to accurate information not confidential by law.

(c) No employee shall be required to respond to an inquiry or inquiries from an individual if it would take the employee more than fifteen minutes to obtain the information responsive to the inquiry or inquiries.

(d) Public employees shall not be discouraged from or disciplined for the expression of their personal opinions on any matter of public concern while not on duty, so long as the opinion (1) is not represented as that of the department and does not misrepresent the department position, and (2) does not disrupt coworker relations, impair discipline or control by supervision, erode a close working relationship or prejudice on personal loyalty and confidentiality, interfere with the employee's performance of his or her duties or obstruct the routine operation of the office in a manner that outweighs the employee's interests in expressing that opinion. In adopting this subdivision, the Board of Supervisors intends merely to restate and affirm court decisions recognizing the First Amendment rights enjoyed by public employees. Nothing in this section shall be construed to provide rights to City employees beyond those recognized by courts, now or in the future, under the First Amendment, or to create any new private cause of action or defense to disciplinary action.

(e) Notwithstanding any other provisions of this ordinance, public employees shall not be discouraged from or disciplined for disclosing any information that is public information or a public record to any journalist or any member of the public. Any public employee who is disciplined for disclosing public information or a public record shall have a cause of action against the City and the supervisor imposing the discipline. (Added by Ord. 266-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67-23. Public Review File--Policy Body Communications.

(a) The clerk of the Board of Supervisors and the clerk of each board and commission enumerated in the charter shall maintain a file, accessible to any person during normal office hours, containing a copy of any letter, memorandum or other communication which the clerk has distributed to or received from a quorum of the policy body concerning a matter calendared by the body within the previous 90 days or likely to be calendared within the next 30 days, irrespective of subject matter, origin or recipient, except commercial solicitations, periodical publications or communications exempt from disclosure under the California Public Records Act (Government Code Section 6250 et seq.) and not deemed disclosable under Section 67.24 of this article.

(b) Communications, as described in subsection (a), sent or received in the last three business days shall be maintained in chronological order in the office of the department head or at a place nearby, clearly designated to the public. After documents have been on file for two full days, they may be removed, and, in the discretion of the board or commission, placed in a monthly chronological file.

(c) Multiple-page reports, studies or analyses which are accompanied by a letter or memorandum of transmittal need not be included in the file so long as the letter or memorandum of transmittal is included. (Added by Ord. 266-93, App. 8/18/93; amended by Proposition G, 11/2/99)

Sec. 67-24. Public Information That Must Be Disclosed.

Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

(a) Drafts and Memoranda.

(1) Except as provided in subparagraph (2), no preliminary draft or department memorandum, whether in printed or electronic form, shall be exempt from disclosure under Government Code Section 6254, subdivision (a) or any other provision. If such a document is not normally kept on file and would otherwise be disposed of, its factual content is not exempt under subdivision (a). Only the recommendation of the author may, in such circumstances, be withheld as exempt.

(2) Draft versions of an agreement being negotiated by representatives of the City with some other party need not be disclosed immediately upon creation but must be preserved and made available for public review for 10 days prior to the presentation of the agreement for approval by a policy body, unless the body finds that and articulates how the public interest would be unavoidsably and substantially harmed by

compliance with this 30 day rule, provided that policy body as used in this subdivision does not include committees. In the case of negotiations for a contract, lease or other business agreement in which an agency of the City is offering to provide facilities or services in direct competition with other public or private entities that are not required by law to make their competing proposals public or do not in fact make their proposals public, the policy body may postpone public access to the final draft agreement until it is presented to for approval.

(38) Litigation Material

(i) Notwithstanding any exemptions otherwise provided by law, the following are public records subject to disclosure under this Ordinance:

(A) A pre-litigation claim against the City;

(B) A record previously received or created by a department in the ordinary course of business that was not attorney/client privileged when it was previously received or created;

(C) Advice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or this Ordinance.

(4) Unless otherwise privileged under California law, when litigation is finally adjudicated or otherwise settled, records of all communications between the department and the adverse party shall be subject to disclosure, including the text and terms of any settlement.

(49) Personal Information. None of the following shall be exempt from disclosure under Government Code Section 6254, subdivision (c), or any other provision of California Law where disclosure is not unwarranted:

(a) The job pool characteristics and employment and education histories of all successful job applicants, including at a minimum the following information as to each successful job applicant:

(i) Sex, age and ethnic group;

(ii) Years of graduate and undergraduate study, degree(s) and major or discipline;

(iii) Years of employment in the private and/or public sector;

(iv) Whether currently employed in the same position for another public agency.

(v) Other non-identifying particulars as to experience, credentials, aptitudes, training or education entered in or attached to a standard employment application form used for the position in question.

(b) The professional biography or curriculum vitae of any employee, provided that the home address, home telephone number, social security number, age, and marital status of the employee shall be redacted.

(c) The job description of every employment classification.

(d) The exact gross salary and City-paid benefits available to every employee.

(e) Any memorandum of understanding between the City or department and a recognized employee organization.

(f) The amount, basis, and recipient of any performance-based increase in compensation, benefits, or both, or any other bonus, awarded to any employee, which shall be announced during the open session of a policy body at which the award is approved.

(g) The record of any confirmed misconduct of a public employee involving personal dishonesty, misappropriation of public funds, resources or benefits, unlawful discrimination against another on the basis of status, abuse of authority, or violence, and of any discipline imposed for such misconduct.

(50) Law Enforcement Information.

The District Attorney, Chief of Police, and Sheriff are encouraged to cooperate with the press and other members of the public in allowing access to local records pertaining to investigations, arrests, and other law enforcement activity. However, no provision of this ordinance is intended to abrogate or interfere with the constitutional and statutory power and duties of the District Attorney and Sheriff as interpreted under Government Code section 25303, or other applicable state law or judicial decision. Records pertaining to any investigation, arrest or other law enforcement activity shall be disclosed to the public once the District Attorney or court determines that a prosecution will not be sought against the subject involved, or once the statute of limitations for filing charges has expired, whichever occurs first. Notwithstanding the occurrence of any such event, individual items of information in the following categories may be segregated and withheld if, on the particular facts, the public interest in nondisclosure clearly and substantially outweighs the public interest in disclosure:

(1) The names of juvenile witnesses (whose identities may nevertheless be indicated by substituting a number or alphabetical letter for each individual interviewed);

(2) Personal or otherwise private information related to or unrelated to the investigation if disclosure would constitute an unwarranted invasion of privacy;

(3) The identity of a confidential source;

(4) Secret investigative techniques or procedures;

(5) Information whose disclosure would endanger law enforcement personnel; or

(6) Information whose disclosure would endanger the successful completion of an investigation where the prospect of enforcement proceedings is concrete and definite.

This subdivision shall not exempt from disclosure any portion of any record of a concluded inspection or enforcement action by an officer or department responsible for regulatory protection of the public health, safety, or welfare.

(c) Contracts, Bids and Proposals

(1) Contracts, contractors' bids, responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(2) Notwithstanding the provisions of this subdivision or any other provision of this ordinance, the Director of Public Health may withhold from disclosure proposed and final rates of payment for managed health care contracts if the Director determines that public disclosure would adversely affect the ability of the City to engage in effective negotiations for managed health care contracts. The authority to withhold this information applies only to contracts pursuant to which the City (through the Department of Public Health) either pays for health care services or receives compensation for providing such services, including mental health and substance abuse services, to covered beneficiaries through a pre-arranged rate of payment. This provision also applies to rates for managed health care contracts for the University of California, San Francisco, if the contract involves beneficiaries who receive services provided jointly by the City and University. This provision shall not authorize the Director to withhold rate information from disclosure for more than three years.

(3) During the course of negotiations for:

(i) personal, professional, or other contractual services not subject to a competitive process or where such a process has arrived at a stage where there is only one qualified or responsive bidder;

(ii) leases or permits having total anticipated revenue or expense to the City and County of five hundred thousand dollars (\$500,000) or more or having a term of ten years or more; or

(iii) any franchise agreements,

all documents exchanged and related to the position of the parties, including draft contracts, shall be made available for public inspection and copying upon request. In the event that no records are prepared or exchanged during negotiations in the above-mentioned categories, or the records exchanged do not provide a meaningful representation of the respective positions, the city attorney or city representative familiar with the negotiations shall, upon a written request by a member of the public, prepare written summaries of the respective positions within five working days following the final day of negotiation of any given week. The summaries will be available for public inspection and copying. Upon completion of negotiations, the executed contract, including the dollar amount of said contract, shall be made available for inspection and copying. At the end of each fiscal year, each City department shall provide to the Board of Supervisors a list of all sole source contracts entered into during the past fiscal year. This list shall be made available for inspection and copying as provided for elsewhere in this Article.

(f) Budgets and Other Financial Information. Budgets, whether tentative, proposed or adopted, for the City or any of its departments, programs, projects or other categories, and all bills, claims, invoices, vouchers or other records of payment obligations as well as records of actual disbursements showing the amount paid, the payee and the purpose for which payment is made, other than payments for social or other services whose records are confidential by law, shall not be exempt from disclosure under any circumstances.

(g) Neither the City nor any office, employee, or agent thereof may assert California Public Records Act Section 6255 or any similar provision as the basis for withholding any documents or information requested under this ordinance.

(h) Neither the City nor any office, employee, or agent thereof may assert an exemption for withholding for any document or information based on a "deliberative process" exemption, either as provided by California Public Records Act Section 6255 or any other provision of law that does not prohibit disclosure.

(f) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 299-95, App. 9/18/95; Ord. 240-98, App. 7/17/98; Proposition G, 11/2/99)

#### Sec. 67-25. Immediacy Of Response.

(a) Notwithstanding the 10-day period for response to a request permitted in Government Code Section 6256 and in this Article, a written request for information described in any category of non-exempt public information shall be satisfied no later than the close of business on the day following the day of the request. This deadline shall apply only if the words "Immediate Disclosure Request" are placed across the top of the request and on the envelope, subject file, or cover sheet in which the request is transmitted. Maximum deadlines provided in this article are appropriate for more extensive or demanding requests, but shall not be used to delay fulfilling a simple, routine or otherwise readily answerable request.

(b) If the voluminous nature of the information requested, its location in a remote storage facility or the need to consult with another interested department warrants an extension of 10 days as provided in Government Code Section 6256.1, the requester shall be notified as required by the close of business on the business day following the request.

(c) The person seeking the information need not state his or her reason for making the request or the use to which the information will be put, and requesters shall not be routinely asked to make such a disclosure. Where a record being requested contains information most of which is exempt from disclosure under the California Public Records Act and this article, however, the City Attorney or custodian of the record may inform the requester of the nature and extent of the non-exempt information and inquire as to the requester's purpose for seeking it, in order to suggest alternative sources for the information which may involve less redaction or to otherwise prepare a response to the request.

(d) Notwithstanding any provisions of California Law or this ordinance, in response to a request for information describing any category of non-exempt public information, when so requested, the City and County shall produce any and all responsive public records as soon as reasonably possible on an incremental or "rolling" basis such that responsive records are produced as soon as possible by the end of the same business day that they are reviewed and collected. This section is intended to prohibit the withholding of public records that are responsive to a records request until all potentially responsive documents have been reviewed and collected. Failure to comply with this provision is a violation of this article. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

#### Sec. 67-26. Withholding Kept To A Minimum.

No record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure under express provisions of the California Public Records Act or of some other statute. Information that is exempt from disclosure shall be marked, deleted or otherwise segregated in order that the nonexempt portion of a requested record may be released, and kept by footnote or other clear reference to the appropriate justification for withholding required by section 67-27 of this article. This work shall be done personally by the attorney or other staff member conducting the exemption review. The work of responding to a public records request and preparing documents for disclosure shall be considered part of the regular work duties of any city employee, and no fee shall be charged to the requester to cover the personnel costs of responding to a records request. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

#### Sec. 67-27. Justification Of Withholding.

Any withholding of information shall be justified, in writing, as follows:

(a) A withholding under a specific permissive exemption in the California Public Records Act, or elsewhere, which permissive exemption is not forbidden to be asserted by this ordinance, shall cite that authority.

(b) A withholding on the basis that disclosure is prohibited by law shall cite the specific statutory authority in the Public Records Act or elsewhere.

(c) A withholding on the basis that disclosure would incur civil or criminal liability shall cite any specific statutory or case law, or any other public agency's litigation experience, supporting that position.

(d) When a record being requested contains information, most of which is exempt from disclosure under the California Public Records Act and this Article, the custodian shall inform the requester of the nature and extent of the nonexempt information and suggest alternative sources for the information requested, if available. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

#### Sec. 67-28. Fees For Duplication.

(a) No fee shall be charged for making public records available for review.

(b) For documents routinely produced in multiple copies for distribution, e.g. meeting agendas and related materials, unless a special fee has been established pursuant to subdivision (d) of this section, a fee not to exceed one cent per page may be charged, plus any postage costs.

(c) For documents assembled and copied to the order of the requester, unless a special fee has been established pursuant to subdivision (d) of this section, a fee not to exceed 10 cents per page may be charged, plus any postage.

(d) A department may establish and charge a higher fee than the one cent presumptive fee in subdivision (b) and the 10 cent presumptive fee in subdivision (c) if it prepares and posts an itemized cost analysis establishing that its cost per page impression exceeds 10 cents or one cent, as the case may be. The cost per page impression shall include the following costs: one sheet of paper; one duplication cycle of the copying machine in terms of labor and other specifically identified operation or maintenance factors, excluding electrical power. Any such cost analysis shall identify the manufacturer, model, vendor and maintenance contractor, if any, of the copying machine or machines relied to.

(e) Video copies of video recorded meetings shall be provided to the public upon request for \$10.00 or less per meeting. (Added by Ord. 265-93, App. 8/18/93; amended by Proposition G, 11/2/99)

#### Sec. 67-29. Index To Records.

The City and County shall prepare a public records index that identifies the types of information and documents maintained by City and County departments, agencies, boards, commissions, and elected offices. The index shall be for the use of City officials, staff and the general public, and shall be organized to permit a general understanding of the types of information maintained, by which officials and departments, for which purposes and for what periods of retention, and under what manner of organization for accessing, e.g. by reference to a name, a date, a proceeding or project, or some other referencing system. The index need not be in such detail as to identify files or records concerning a specific person, transaction or other event, but shall clearly indicate where and how records of that type are kept. Any such master index shall be reviewed by appropriate staff for accuracy and presented for formal adoption to the administrative official or policy body responsible for the indexed records. The City Administrator shall be responsible for the preparation of this records index. The City Administrator shall report on the progress of the index to the Sunshine Ordinance Task Force on at least a semi-annual basis until the index is complete. Each department, agency, commission and public official shall cooperate with the City Administrator to identify the types of records it maintains, including those documents created by the entity and those documents received in the ordinary course of business and the types of requests that are regularly received. Each department, agency, commission and public official is encouraged to solicit and encourage public participation to develop a meaningful records index. The index shall clearly and meaningfully describe, with as much specificity as practicable, the individual types of records that are prepared or maintained by each department, agency, commission or public official of the City and County. The index shall be sufficient to aid the public in making an inquiry or a request to inspect. Any changes in the department, agency, commission or public official's practices or procedures affecting the accuracy of the information provided to the City Administrator shall be recorded by the City Administrator on a periodic basis so as to maintain the integrity and accuracy of the index. The index shall be continuously maintained on the City's World Wide Website and made available at public libraries within the City and County of San Francisco. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 287-96, App. 7/12/96; Proposition G, 11/2/99)

#### Sec. 67-29-1. Records Survive Transition Of Officials.

All documents prepared, received, or maintained by the Office of the Mayor, by any elected city and county official, and by the head of any City or County Department are the property of the City and County of San Francisco. The originals of these documents shall be maintained consistent with the records retention policies of the City and County of San Francisco. (Added by Proposition G, 11/2/99)

#### Sec. 67-29-2. Internet Access/World Wide Web Minimum Standards.

Each department of the City and County of San Francisco shall maintain on a World Wide Web site, or on a comparable, readily accessible location on the Internet, information that it is required to make publicly available. Each department is encouraged to make publicly available through its World Wide Web site, as much information and as many documents as possible concerning its activities. At a minimum, within six months after enactment of this provision, each department shall post on its World Wide Web site all meeting notices required under this ordinance, agendas and the minutes of all previous meetings of its policy bodies for the last three years. Notices and agendas shall be posted no later than the time that the department otherwise distributes this information to the public, allowing reasonable time for posting. Minutes of meetings shall be posted as soon as possible, but in any event within 48 hours after they have been approved. Each department shall make reasonable efforts to ensure that its World Wide Web site is regularly reviewed for timeliness and updated on at least a weekly basis. The City and County shall also make available on its World Wide Web site, or on a comparable, readily accessible location on the Internet, a current copy of the City Charter and all City Codes. (Added by Proposition G, 11/2/99)

#### SEC. 67-29-3.

Any future agreements between the city and an advertising space provider shall be public records and shall include as a basis for the termination of the contract any action by, or permitted by, the space provider to remove or deface or otherwise interfere with an advertisement without first notifying the advertiser and the city and obtaining the advertiser's consent. In the event advertisements are defaced or vandalized, the space provider shall provide written notice to the city and the advertiser and shall allow the advertiser the option of replacing the defaced or vandalized material. Any request by any city official or by any space provider to remove or alter any advertising matter be in writing and shall be a public record. (Added by Proposition G, 11/2/99)

#### Sec. 67-29-4. Lobbyist On Behalf Of The City.

(a) Any lobbyist who contracts for economic consideration with the City and County of San Francisco to represent the City and County in matters before any local, regional, state, or federal administrative or

legislative body shall file a public records report of their activities on a quarterly basis with the San Francisco Ethics Commission. This report shall be maintained by the Ethics Commission and not be exempt from disclosure. Each quarterly report shall identify all financial expenditures by the lobbyist, the individual or entity to whom each expenditure was made, the date the expenditure was made, and specifically identify the local, state, regional or national legislative or administrative action the lobbyist supported or opposed in making the expenditure. The failure to file a quarterly report with the required disclosures shall be a violation of this Ordinance.

(b) No person shall be deemed a lobbyist under section (a), unless that person receives or becomes entitled to receive at least \$300 total compensation in any month for influencing legislative or administrative action on behalf of the City and County of San Francisco or has at least 25 separate contacts with local, state, regional or national officials for the purpose of influencing legislative or administrative action within any two consecutive months. No business or organization shall be deemed as a lobbyist under section (a) unless it compensates its employees or members for their lobbying activities on behalf of the City and County of San Francisco, and the compensated employees or members have at least 25 separate contacts with local, state, regional or national officials for the purpose of influencing legislative or administrative action within any two consecutive months. "Total compensation" shall be calculated by combining all compensation received from the City and County of San Francisco during the month for lobbying activities on matters at the local, state, regional or national level. "Total number of contacts" shall be calculated by combining all contacts made during the two-month period on behalf of the City and County of San Francisco for all lobbying activities on matters at the local, state, regional or national level.

(c) Funds of the City and County of San Francisco, including organizational funds, shall not be used to support any lobbying efforts to restrict public access to records, information, or meetings, except where such effort is solely for the purpose of protecting the identity and privacy rights of private citizens. (Added by Proposition G, 11/2/99)

Sec. 67.29-5. Calendars Of Certain Officials.

The Mayor, The City Attorney, and every Department Head shall keep or cause to be kept a daily calendar wherein is recorded the time and place of each meeting or event attended by that official, with the exclusion of purely personal or social events at which no city business is discussed and that do not take place at City Offices or at the offices or residences of people who do substantial business with or are otherwise substantially financially affected by actions of the city. For meetings not otherwise publicly recorded, the calendar shall include a general statement of issues discussed. Such calendars shall be public records and shall be available to any requester three business days subsequent to the calendar entry date. (Added by Proposition G, 11/2/99)

Sec. 67.29-6. Sources Of Outside Funding.

No official or employee or agent of the city shall accept, allow to be collected, or direct or influence the spending of, any money, or any goods or services worth more than one hundred dollars in aggregate, for the purpose of carrying out or assisting any City function unless the amount and source of all such funds is disclosed as a public record and made available on the website for the department to which the funds are directed. When such funds are provided or managed by an entity, and not an individual, that entity must agree in writing to abide by this ordinance. The disclosure shall include the names of all individuals or organizations contributing such money and a statement as to any financial interest the contributor has involving the City. (Added by Proposition G, 11/2/99)

Sec. 67.29-7. Correspondence And Records Shall Be Maintained.

(a) The Mayor and all Department Heads shall maintain and preserve in a professional and businesslike manner all documents and correspondence, including but not limited to letters, e-mails, drafts, memoranda, invoices, reports and proposals and shall disclose all such records in accordance with this ordinance.

(b) The Department of Elections shall keep and preserve all records and invoices relating to the design and printing of ballots and other election materials and shall keep and preserve records documenting who had custody of ballots from the time ballots are cast until ballots are received and certified by the Department of Elections.

(c) In any contract, agreement or permit between the City and any outside entity that authorizes that entity to demand any funds or fees from citizens, the City shall ensure that accurate records of each transaction are maintained in a professional and businesslike manner and are available to the public as public records under the provisions of this ordinance. Failure of an entity to comply with these provisions shall be grounds for terminating the contract or for imposing a financial penalty equal to one-half of the fees derived under the agreement or permit during the period of time when the failure was in effect. Failure of any Department Head under this provision shall be a violation of this ordinance. This paragraph shall apply to any agreement allowing an entity to tow or impound vehicles in the City and shall apply to any agreement allowing no entity to collect any fee from any person in any pretax diversion program. (Added by Proposition G, 11/2/99)

Sec. 67.30. The Sunshine Ordinance Task Force.

(a) There is hereby established a task force to be known as the Sunshine Ordinance Task Force consisting of eleven voting members appointed by the Board of Supervisors. All members must have experience and/or demonstrated interest in the issues of citizen access and participation in local government. Two members shall be appointed from individuals whose names have been submitted by the local chapter of the Society of Professional Journalists, one of whom shall be an attorney and one of whom shall be a local journalist. One member shall be appointed from the press or electronic media. One member shall be appointed from individuals whose names have been submitted by the local chapter of the League of Women Voters. Four members shall be members of the public who have demonstrated interest in or have experience in the issues of citizen access and participation in local government. Two members shall be members of the public experienced in consumer advocacy. One member shall be a journalist from a racial/ethnic/minority-owned news organization and shall be appointed from individuals whose names have been submitted by New California Media. At all times the task force shall include at least one member who shall be a member of the public who is physically handicapped and who has demonstrated interest in citizen access and participation in local government. The Mayor or his or her designee, and the Clerk of the Board of Supervisors or his or her designee, shall serve as non-voting members of the task force. The City Attorney shall serve as legal advisor to the task force. The Sunshine Ordinance Task Force shall, at its request, have assigned to it an attorney from within the City Attorney's Office or other appropriate City Office, who is experienced in public access law matters. This attorney shall serve solely as a legal advisor and advocate to the Task Force and an ethical wall will be maintained between the work of this attorney on behalf of the Task Force and any person or Office that the Task Force determines may have a conflict of interest with regard to the matters being handled by the attorney.

(b) The term of each appointive member shall be two years unless earlier removed by the Board of Supervisors. In the event of such removal or in the event a vacancy otherwise occurs during the term of office of any appointive member, a successor shall be appointed for the unexpired term of the office vacated in a manner similar to that described herein for the initial members. The task force shall elect a chair from among its appointive members. The term of office as chair shall be one year. Members of the task force shall serve without compensation.

(c) The task force shall advise the Board of Supervisors and provide information to other City departments on appropriate ways in which to implement this chapter. The task force shall develop appropriate goals to ensure practical and timely implementation of this chapter. The task force shall propose to the Board of Supervisors amendments to this chapter. The task force shall report to the Board of Supervisors at least once annually on any practical or policy problems encountered in the administration of this chapter. The Task Force shall receive and review the annual report of the Supervisor of Public Records and may request additional reports or information as it deems necessary. The Task Force shall make referrals to a municipal office with enforcement power under this ordinance or under the California Public Records Act and the Brown Act whenever it concludes that any person has violated any provisions of this ordinance or the Acts. The Task Force shall, from time to time as it sees fit, issue public reports evaluating compliance with this ordinance and related California laws by the City or any Department, Office, or Official thereof.

(d) In addition to the powers specified above, the Task Force shall possess such powers as the Board of Supervisors may confer upon it by ordinance or as the People of San Francisco shall confer upon it by initiative.

(e) The Task Force Commission shall approve by-laws specifying a general schedule for meetings, requirements for attendance by Task Force members, and procedures and criteria for removing members from non-attendance. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 118-94, App. 3/18/94; Ord. 422-94, App. 12/30/94; Ord. 287-96, App. 7/12/96; Ord. 398-98, App. 6/19/98; Ord. 387-98, App. 12/24/98; Proposition G, 11/2/99)

Sec. 67.31. Responsibility For Administration.

The Mayor shall administer and coordinate the implementation of the provisions of this chapter for departments under his or her control. The Mayor shall administer and coordinate the implementation of the provisions of this chapter for departments under their respective control. The Clerk of the Board of Supervisors shall provide a full-time staff person to perform administrative duties for the Sunshine Ordinance Task Force and to assist any person in gaining access to public meetings or public information. The Clerk of the Board of Supervisors shall provide that staff person with whatever facilities and equipment are necessary to perform said duties. (Added by Ord. 265-93, App. 8/18/93; amended by Ord. 287-96, App. 7/12/96; Proposition G, 11/2/99)

Sec. 67.32. Provision Of Services To Other Agencies; Sunshine Required.

It is the policy of the City and County of San Francisco to ensure opportunities for informed civic participation embodied in this Ordinance to all local, state, regional and federal agencies and institutions with which it maintains continuing legal and political relationships. Officers, agents and other representatives of the City shall continually, consistently and assertively work to seek commitments to enact open meetings, public information and citizen comment policies by these agencies and institutions, including but not limited to the Presidio Trust, the San Francisco Unified School District, the San Francisco Community College District, the San Francisco Transportation Authority, the San Francisco Housing Authority, the Treasure Island Development Authority, the San Francisco Redevelopment Authority and the University of California. To the extent not expressly prohibited by law, copies of all written communications with the above identified entities, and any City employee, officer, agent, or representative, shall be accessible as public records. To the extent not expressly prohibited by law, any meeting of the governing body of any such agency and institution at which City officers, agents or representatives are present in their official capacities shall be open to the public, and this provision cannot be waived by any City officer, agent or representative. The city shall give no subsidy in money, tax abatements, land, or services to any private entity unless that private entity agrees in writing to provide the city with financial projections (including profit and loss figures), and annual audited financial statements for the project thereafter, for the project upon which the subsidy is based and all such projections and financial statements shall be public records that must be disclosed. (Added by Proposition G, 11/2/99)

Sec. 67.33. Department Head Declaration.

All City Department heads and all city management employees and all employees or officials who are required to sign an affidavit of financial interest with the Ethics Commission shall sign an annual affidavit or declaration stating under penalty of perjury that they have read the Sunshine Ordinance and have attended or will attend when next offered, a training session on the Sunshine Ordinance, to be held at least

once annually. The affidavit or declarations shall be maintained by the Ethics Commission and shall be available as a public record. Annual training shall be provided by the San Francisco City Attorney's Office with the assistance of the Sunshine Ordinance Task Force. (Added by Proposition G, 11/2/99)

**Sec. 67.34. Willful Failure Shall Be Official Misconduct.**

The willful failure of any elected official, department head, or other managerial city employee to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the Public Records Act shall be deemed official misconduct. Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission. (Added by Proposition G, 11/2/99)

**Sec. 67.35. Enforcement Provisions.**

(a) Any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this Ordinance or to enforce his or her right to attend any meeting required under this Ordinance to be open, or to compel such meeting to be open.

(b) A court shall award costs and reasonable attorneys' fees to the plaintiff who is the prevailing party in an action brought to enforce this Ordinance.

(c) If a court finds that an action filed pursuant to this section is frivolous, the City and County may assert its rights to be paid its reasonable attorneys' fees and costs.

(d) Any person may institute proceedings for enforcement and penalties under this act in any court of competent jurisdiction or before the Ethics Commission if enforcement action is not taken by a city or state official 40 days after a complaint is filed. (Added by Proposition G, 11/2/99)

**Sec. 67.36. Sunshine Ordinance Supersedes Other Local Laws.**

The provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply. (Added by Proposition G, 11/2/99)

**Sec. 67.37. Severability.**

The provisions of this chapter are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this chapter, or the invalidity of the application thereof to any person or circumstances, shall not affect the validity of the remainder of this chapter, or the validity of its application to other persons or circumstances. (Added by Ord. 266-93, App. 8/18/93, amended by Proposition G, 11/2/99)

**Sec. 67.3. Prohibiting The Use Of Cell Phones, Pagers And Similar Sound-Producing Electrical Devices At And During Public Meetings.**

At and during a public meeting of any policy body governed by the San Francisco Sunshine Ordinance, the ringing and use of cell phones, pagers and similar sound-producing electronic devices shall be prohibited. The presiding officer of any public meeting which is disrupted may order the removal from the meeting room of any person(s) responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices. The presiding officer may allow an expelled person to return to the public meeting following an agreement by the expelled person to comply with the provisions of this Section. A warning of the provisions of this Section shall be printed on all meeting agendas, and shall be explained at the beginning of each public meeting by the presiding officer. (Added by Ord. 286-00, File No. 001355, App. 12/22/2000)

## PUBLIC COMPLAINT PROCEDURE

Consistent with the language and spirit of the San Francisco Sunshine Ordinance (Ordinance) to provide the most open government possible (see City Administrative Code Section (§) 67.1), all inferences and evidence shall be viewed in the light most favorable to the petitioner.

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Revised 4/26/2005, Revised as to form 5/22/2007, 3/25/2008 & 4/28/09

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The Sunshine Ordinance Task Force (SOTF) has an obligation under San Francisco Administrative Code §§67.21 (e), 67.30(c) and 12L.1-10 to respond to public complaints.

### A. Inquiries In Person or by Phone

It is the goal of the SOTF to help the public gain access to public records and meetings. The staff of the SOTF will therefore work with members of the public to help achieve such access in order to avoid the need for filing complaints with the SOTF.

1. The Administrator shall discuss the request with the member of the public and attempt, with the assistance of the City Attorney, to mediate the request.
2. If unable to facilitate access to a desired record or to a public meeting, the SOTF staff shall advise the members of the public of his/her right to file a petition with the Supervisor of Records (the City Attorney's Office) and to pursue the SOTF complaint process, and shall send the complainant a packet of information regarding the complaint process.

### B. Filing a Complaint with the SOTF

1. A letter or complaint form may be submitted to the SOTF via mail, fax or electronic mail (email), or in person. If a complaint letter is received, the Administrator shall complete a complaint form and send a copy to the complainant for their review. The complaint form shall include a box to indicate if the complainant wants a public hearing before the Task Force or a pre-hearing conference before the Complaint Committee to focus the complaint or to otherwise assist the parties to the complaint. Once filed a copy of the complaint shall be sent to the Chairs of the full Task Force and Complaint Committee, and the SOTF Deputy City Attorney.
2. Upon filing a complaint, the complainant shall be given a condensed checklist of procedural requirements (i.e. complaint process, documentation deadlines, etc.). The responding City department/agency (respondent) shall be sent written notice of the complaint with a checklist of procedures, with a request to respond to the charges in the complaint within 5 business days. The Deputy City Attorney who advises City departments/agencies may assist the respondent in preparing a response to the complaint. (See Addendum)

3. Hearing Schedule:

- (a) If the responding City department (respondent) does not contest jurisdiction or there is no request for a pre-hearing conference to focus the complaint or otherwise assist the parties to the complaint, a hearing will be scheduled with the Full Task Force.
- (b) If the responding City department (respondent) contests jurisdiction or there is a request for a pre-hearing conference to focus the complaint or otherwise assist the parties to the complaint a hearing will be scheduled with the Complaint Committee prior to the hearing before the Full Task Force.

4. The Administrator shall advise the complainant and the affected department/agency of the date, time and location of the Complaint Committee and/or Full Task Force meetings at which the complaint will be discussed. The respondent shall have a knowledgeable representative and/or its custodian of records at the meeting. The Administrator shall inform both parties of the deadline to submit any supporting documentation. Both parties shall be held to the stated deadlines: five working days before the hearing.

5. The Administrator shall gather all relevant documents prior to the forthcoming hearing/s and shall send the documents to the members for their review. When the documents exceed 75 pages, the complaint will be forwarded without its full exhibits, with an indication that the full exhibits are on file with the Administrator.

6. Complaint Committee Hearings:

- (a.) The SOTF Deputy City Attorney, shall provide a written opinion to the Complaint Committee as to whether the SOTF has jurisdiction over the complaint.
- (b.) The Complaint Committee shall review a complaint where jurisdiction is contested or a pre-hearing conference is requested at its next meeting and recommend whether the SOTF has jurisdiction. The Committee shall also focus the issues for the complainant, respondent and SOTF, or otherwise assist the parties.

7. When the Complaint Committee recommends accepting jurisdiction, it shall do so at the next regular SOTF meeting unless this would result in a violation of the 45-day time limit for resolving complaints (mandated by §67.21); in such a case, a special meeting shall be called to hear the matter. The complainant may waive the 45-day rule or request a special hearing within the 45-day period.

8. Continuances:

- (a) A complainant may waive the 45-day rule and if a request for continuance is submitted at least three business days in advance of the scheduled hearing it shall be granted. For requests submitted less than three business days in advance or for requests for subsequent continuances, the request shall be granted by a simple majority vote of the members present.
- (b) If a respondent submits a request for continuance at least three business days in advance, upon agreement of the complainant the continuance shall be granted. If the complainant does not agree to the continuance, the

request for continuance is not made within three business days, or the respondent is requesting a subsequent continuance, such continuance shall be granted by a simple majority vote of the members present.  
(Adopted 5/22/07)

### **C. Public Hearing Procedure**

If jurisdiction is not contested or the Complaint Committee recommends jurisdiction, the complainant and respondent shall receive a written notice of the specific issues that shall be before the SOTF for a hearing, and they shall be advised to submit any evidence no later than 5 working days prior to the hearing.

#### **Documentation**

For a document to be considered, it must be received at least 5 working days before the hearing (Tuesday before the actual meeting). At the hearing before the Task Force, should the complainant submit additional documentation that has not been submitted to all parties, he or she shall be given the following options:

- (1) Proceed with the hearing without SOTF consideration of the additional documentation;
- (2) Waive his/her right to a hearing within 45 days and ask for the hearing to be continued; but
- (3) If the additional documentation raises a new issue, the complainant may
  - proceed with the hearing and file a new complaint on the additional issue(s), or
  - withdraw and amend the complaint to include the new issue(s).

### **D. Hearing and Findings of the Task Force**

1. Prior to the meeting, the SOTF Deputy City Attorney shall prepare an instructional letter to assist the SOTF in understanding the issues. All members of the SOTF are responsible for being familiar with the complaint issues prior to the meeting.
2. The SOTF shall conduct the public hearing with the complainant and respondent present.
3. After hearing all testimony, the SOTF shall vote on an Order of Determination or other directives written by the Chair of behalf of the Task Force stating whether the record is public and/or whether the open meeting laws were obeyed.
4. After the SOTF determines a course of action, the complainant and respondent shall be notified in writing.

#### **E. Reconsideration of Task Force Findings**

1. Within 10 days of receipt issuance of the Order of Determination, either the complainant or respondent may petition the SOTF for a reconsideration only if information exists that was not available at the time of the hearing and the petitioning party must present an offer of proof as to the new information.
2. The Task Force shall consider the petition at its next scheduled meeting. If a petition for reconsideration is granted, a new hearing on the complaint shall be scheduled at the next SOTF meeting. (Approved by Task Force 10/26/04)

#### **F. Department to Comply with Determination of the SOTF**

1. The Administrator shall send the Order of Determination to the complainant and the respondent and request a written response within 5 days of the receipt of the Order and as necessary request a written response, which shall be monitored by the SOTF Compliance and Amendments Committee and/or any committee recommended by the Chair. If a public records violation is found, the custodian of records shall be ordered to provide the record to the complainant within 5 days after the issuance of the Order of Determination. The Compliance and Amendments Committee shall review whether there has been compliance with the Order of Determination.
2. If there is a failure to comply, the Compliance and Amendments Committee may recommend that the SOTF notify the District Attorney, the California Attorney General, the Board of Supervisors and/or the Ethics Commission, who may take measures they deem necessary to ensure compliance with the Ordinance. A copy of the Order of Determination shall be included with such notification.
3. If appropriate, the respondent and complainant shall be sent a notice that the District Attorney, California Attorney General, Board of Supervisors and Ethics Commission have been contacted, and of the complainant's independent right to pursue the issue in court.

#### **G. Documentation and Information Regarding Individual Complaints:**

1. The Administrator shall keep a file of all documents and a log of all petitions filed with the SOTF, including the date of each petition, the department/agency against which it was made, the nature of the complaint and its status. This shall be in compliance with its records and retention schedule.
2. Copies of all correspondence relating to a complaint shall be sent to all parties.

## Complaint Process

1. You may fill out a complaint form online or access a form at [sfgov.org/site/sunshine](http://sfgov.org/site/sunshine), or you may send your own letter filing a formal complaint. File the complaint with the Sunshine Ordinance Task Force, 1 Dr. Carlton B. Goodlett Pl., Room 244, San Francisco, CA 94102-4689; or you may send it by fax to (415) 554-7854 or email to [sotf@sfgov.org](mailto:sotf@sfgov.org).
2. After you file a complaint, the Complaint Committee of the Sunshine Ordinance Task Force (SOTF) shall, if jurisdiction is contested and/or a request for a pre-hearing conference is received, review it to determine if the SOTF has jurisdiction and to focus on the relevant issues in the case.
  - Jurisdiction is defined as the authority to address a given issue(s), as specified in the Sunshine Ordinance.
3. If the Complaint Committee finds no jurisdiction over the violations alleged in the complaint, the complainant is notified of the decision and the complainant may request reconsideration before the SOTF at its next scheduled meeting. Should the SOTF find jurisdiction, a full hearing on the merits will be scheduled.
4. If the Complaint Committee finds the SOTF has jurisdiction, the complainant, respondent and SOTF members are notified of the decision.
5. The complaint is then scheduled for a hearing at the next meeting of the SOTF, which has the final say on the jurisdiction issue.
6. If additional information is to be submitted by the complainant or respondent, it must be submitted to the Administrator at least five working days before the scheduled hearing before the Task Force.

If either party submits additional material after the deadline, they will be informed that

  - a. The Task Force may proceed without considering the new material.
  - b. The complainant may waive the 45-day time limit and continue the hearing to the next Task Force meeting.
  - c. The complainant may withdraw the complaint and file a new complaint.
  - d. The complainant may proceed to hearing with their current complaint and file a new complaint and use the new information to support the freestanding separate complaint.
7. After the public hearing, the Task Force may make an Order of Determination regarding the complaint.
8. For further information, contact the Sunshine Ordinance Task Force Administrator, at (415) 554-7724.

San Francisco  
Ethics Commission



25 Van Ness Ave., Suite 220  
San Francisco, CA 94102  
Phone 252-3100 Fax 252-3112

## ETHICS COMMISSION REGULATIONS FOR HANDLING VIOLATIONS OF THE SUNSHINE ORDINANCE

*Effective Date: January 25, 2013*  
*Includes amendments effective November 22, 2013*

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## CHAPTER ONE

### I. PREAMBLE

Pursuant to San Francisco Charter, section 15.102, the San Francisco Ethics Commission promulgates these Regulations in order to ensure compliance with the San Francisco Sunshine Ordinance, San Francisco Administration Code, section 67.1, et seq. These Regulations shall apply to complaints alleging violations of the Sunshine Ordinance. All complaints alleging violations of conflict of interest, campaign finance, lobbyist, campaign consultant or other governmental ethics laws shall be handled separately under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.

### II. DEFINITIONS

For purposes of these Regulations, the following definitions shall apply:

- A. "Brown Act" means California Government Code section 54950, et seq.
- B. "Business day" means any day other than a Saturday, Sunday, City holiday, or a day on which the Commission office is closed for business.
- C. "California Public Records Act" means California Government Code section 6250, et seq.
- D. "City" means the City and County of San Francisco.
- E. "City officer" means any officer identified in San Francisco Administrative Code Section 1.50, as well as any City body composed entirely of such officers.
- F. "Commission" means the Ethics Commission.
- G. "Complaint" means a Task Force referral or a referral from the Supervisor of Records, a written document submitted directly to the Ethics Commission alleging a violation of the Sunshine Ordinance, or a matter initiated by Ethics Commission staff alleging a violation of the Sunshine Ordinance.
- H. "Complainant" means a person or entity that initiated a matter with the Task Force, Supervisor of Records, or Commission alleging a violation of the Sunshine Ordinance. "Complainant" shall also mean the Commission if the matter was initiated by Commission staff.
- I. "Custodian" means a City officer or employee having custody of any public record.

J. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next business day.

K. "Deliver" means transmit by U.S. mail or personal delivery to a person or entity. The Commission, the Executive Director, the Task Force, a Respondent, or the Complainant receiving material may consent to any other means of delivery, including delivery by e-mail or fax. In any proceeding, the Commission Chairperson may order that the delivery of briefs or other materials be accomplished by e-mail.

L. "Elected official" shall mean the Mayor, a Member of the Board of Supervisors, City Attorney, District Attorney, Treasurer, Sheriff, Assessor, Public Defender, a Member of the Board of Education of the San Francisco Unified School District, and a Member of the Governing Board of the San Francisco Community College District.

M. "Executive Director" means the Executive Director of the Commission or the Executive Director's designee.

N. "Exculpatory information" means information tending to show that the Respondent has not committed the alleged violation(s).

O. "Order of Determination" means: 1) an order from the Task Force that forms the basis of a show cause hearing for Task Force referrals made under Sunshine Ordinance section 67.30(c); or 2) a final recommendation issued by the Task Force, made pursuant to Sunshine Ordinance section 67.34, that a willful violation of the Sunshine Ordinance by an elected official or department head occurred.

P. "Public Records" means records as defined in section 6252(e) of the California Public Records Act, which includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics, and/or Sunshine Ordinance section 67.20(b).

Q. "Referral" means a document from the Task Force or Supervisor of Records to the Commission finding a violation of the Sunshine Ordinance.

R. "Respondent" means a City officer or City employee who is alleged or identified in a complaint to have committed a violation of the Sunshine Ordinance.

S. "Sunshine Ordinance" means San Francisco Administrative Code section 67.1, et seq.

T. "Task Force" means the Sunshine Ordinance Task Force, established by San Francisco Administrative Code section 67.30.

U. "Willful violation" means an action or failure to act with the knowledge that such act or failure to act was a violation of the Sunshine Ordinance.

## CHAPTER TWO

### I. REFERRALS TO THE ETHICS COMMISSION

#### **A. Matters to be heard in a Show Cause Hearing.**

1. Under this Chapter, the Ethics Commission will conduct a Show Cause Hearing on any referral, as defined by these Regulations, finding:
  - a. willful violations of the Sunshine Ordinance by City officers and employees (other than elected officials or department heads), or
  - b. non-willful violations of the Sunshine Ordinance by elected officials, department heads, or City officers and employees.
2. Complaints alleging willful violations of the Sunshine Ordinance against elected officials and department heads shall be handled pursuant to Chapter Three of these regulations.

#### **B. Scheduling of Show Cause Hearing.**

1. After receipt of a referral, the Commission shall schedule a Show Cause Hearing on the matter at the next regular Ethics Commission meeting, provided that the Show Cause Hearing can be scheduled pursuant to the agenda and notice requirements as set forth in Sunshine Ordinance section 67.7 and the Brown Act.
2. In the event that four or more Commissioners will not be present at the scheduled Show Cause Hearing, the Commission may reschedule or continue to the next practicable regular Ethics Commission meeting.

### II. SHOW CAUSE HEARING

#### **A. Public Hearing.** The Show Cause Hearing shall be open to the public.

#### **B. Standard of Proof.** The Respondent(s) shall have the burden to show that he or she did not commit a violation of the Sunshine Ordinance.

#### **C. Hearing Procedures.**

1. Each Respondent and Complainant may speak on his or her own behalf, subject to the following time limits: each Respondent shall be permitted a five-minute statement; each Complainant shall be permitted a five-minute statement; and each Respondent shall be permitted a three-minute rebuttal. At his or her discretion, the Commission Chairperson may allow additional testimony and may extend the time limit for the parties.

2. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing. Each Respondent and Complainant may submit any documents to the Commission to support his or her position. Each party's written submission shall not exceed five pages, excluding supporting documents. Any documents so provided shall also be provided to the opposing party and shall be delivered to the Commission no later than five business days prior to the scheduled hearing. Upon mutual consent of the Complainant(s), Respondent(s), and the Executive Director, a response may be distributed by e-mail. Commissioners may question each party or any other person providing testimony regarding the allegations. The Respondent(s) and Complainant(s) may not directly question each other.

3. If either party fails to appear and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, section I.E, then the Commission may make a decision in the party's absence.

#### **D. Deliberations and Findings.**

1. The Commission shall deliberate in public. Public comment on the matter shall be allowed at each hearing, in accordance with the Sunshine Ordinance and the Brown Act.

2. To determine that a violation of the Sunshine Ordinance did not occur, the Commission must conclude that, based on a preponderance of the evidence, the Respondent did not commit a violation of the Sunshine Ordinance. The Commission shall consider all the relevant circumstances surrounding the case.

3. The votes of at least three Commissioners are required to make a finding that a Respondent has not committed a violation of the Sunshine Ordinance. The finding that a Respondent did or did not commit a violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings.

#### **E. Ethics Commission Orders.**

1. If the Commission finds that a Respondent committed a violation of the Sunshine Ordinance, the Commission may issue orders requiring any or all of the following:

a. the Respondent(s) to cease and desist the violation and/or produce the public record(s); and/or

b. the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent(s) violated the Sunshine Ordinance; and/or

c. The Executive Director to issue a warning letter to the Respondent and inform the Respondent's appointing authority of the violation.

2. After making its decision, the Commission will instruct staff to prepare a written order reflecting the Commission's findings. The Chairperson shall be authorized to approve and sign the Commission's written order on behalf of the full Commission.

3. After issuing an order or instructing the Executive Director to act, or upon a finding of no violation, the Commission will take no further action on the matter.

**F. Public Announcement.**

Once the Commission determines that the Respondent did or did not commit a violation of the Sunshine Ordinance, the Commission will publicly announce this conclusion. The Commission's announcement may, but need not, include findings of law and fact.

### CHAPTER THREE

I. COMPLAINTS ALLEGING WILLFUL VIOLATIONS OF THE  
SUNSHINE ORDINANCE BY ELECTED OFFICIALS OR  
DEPARTMENT HEADS  
OR  
COMPLAINTS FILED DIRECTLY WITH THE ETHICS COMMISSION  
ALLEGING VIOLATIONS OF THE SUNSHINE ORDINANCE.

A. Matters heard under this Chapter.

1. Pursuant to Sunshine Ordinance, section 67.34, the Ethics Commission shall handle complaints alleging violations of the Sunshine Ordinance by an elected official or department head.
2. Pursuant to Sunshine Ordinance, section 67.35(d), if the District Attorney and/or Attorney General take no action for 40 days after receiving notification of a custodian's failure to comply with an order made pursuant to Sunshine Ordinance section 67.21(d) or (e), then the person who made the public record request may file a complaint directly with the Ethics Commission relating to that failure to comply.
3. Ethics Commission staff may initiate a complaint to allege a violation of the Sunshine Ordinance against any City officer or City employee.
4. This Chapter will govern:
  - a. referrals alleging willful violations of the Sunshine Ordinance against an elected official or department head, and
  - b. complaints initiated under subsections A.2 or A.3 alleging violations of the Sunshine Ordinance by any City officer or employee.
5. Any referral that does not allege a willful violation of the Sunshine Ordinance against an elected official or a department head shall be handled pursuant to Chapter Two of these regulations.

B. Scheduling of Hearing.

1. When the Executive Director receives a referral alleging a willful violation of the Sunshine Ordinance against an elected official or a department head, or when the Executive Director receives a complaint filed under subsection A.2, or when staff initiates a complaint under subsection A.3, the Executive Director shall, within 15 business days of the conclusion of his or her investigation, schedule a public hearing at the next regular meeting of the Commission, unless impracticable, provided that the hearing can be scheduled pursuant to the agenda and notice requirements as set forth in Sunshine Ordinance section 67.7 and the Brown Act.

2. Within 15 business days of the conclusion of his or her investigation, the Executive Director shall issue a written notice and his or her report and recommendation pursuant to Chapter Three, section II.C, to each Commission member, each Respondent, and each Complainant, including the date, time and location of the hearing.

3. In the case of a referral, the Executive Director also shall provide a courtesy notice and a copy of the report and recommendation to the referring body.

## II. INVESTIGATION AND RECOMMENDATION

### A. Factual Investigation.

Upon receipt of a complaint, the Executive Director shall conduct a factual investigation. The Executive Director's investigation may include, but shall not be limited to, interviews of the Respondent(s) and any witnesses, as well as the review of documentary and other evidence. The investigation shall be concluded within 30 days following the Executive Director's receipt of the complaint. The Executive Director may extend the time for good cause, including but not limited to: staffing levels; the number of other pending complaints under these Regulations or the Ethics Commission Regulations for Investigations and Enforcement Proceedings; other Ethics Commission proceedings; other staffing needs associated with pending campaigns; or the cooperation of witnesses, Complainants or Respondents. If the Executive Director extends the time for the investigation to conclude, his or her reasons for the extension shall be included in the report to the Ethics Commission.

### B. Subpoenas.

During an investigation, the Executive Director may compel by subpoena the testimony of witnesses and the production of documents relevant to the investigation.

### C. Report and Recommendation.

1. After the Executive Director has completed his or her investigation, the Executive Director shall prepare a written report and recommendation summarizing his or her factual and legal findings. The recommendation shall contain a summary of the relevant legal provisions and the evidence gathered through the Commission's investigation. To support the report and recommendation, the Executive Director may submit evidence through declaration. The report and recommendation shall not exceed ten pages excluding attachments.

2. The report shall recommend one of the following:

a. that Respondent(s) willfully violated the Sunshine Ordinance;

- b. that Respondent(s) violated the Sunshine Ordinance but the violation was not willful; or
- c. that Respondent(s) did not violate the Sunshine Ordinance.

**D. Response to the Report and Recommendation.**

- 1. Each Complainant and Respondent may submit a written response to the Director's report and recommendation. The response may contain legal arguments, a summary of evidence, and any mitigating or aggravating information. In support of the response, each Complainant and Respondent may submit evidence through declaration. The response shall not exceed ten pages excluding attachments.
- 2. If any Complainant or Respondent submits a response, he or she must deliver the response to all parties no later than five business days prior to the date of the hearing. The Complainant or Respondent must deliver eight copies of the response to the Executive Director, who must then immediately distribute copies of the response(s) to the Commission and any other Complainant or Respondent. Upon mutual consent of the Complainant(s), Respondent(s), and the Executive Director, a response may be distributed by e-mail.

**III. PUBLIC HEARING**

**A. General Rules and Procedures.**

- 1. The hearing shall be open to the public.
- 2. Each Complainant and Respondent may speak on his or her own behalf, subject to the following time limits: Complainant shall be permitted a ten-minute statement; Respondent shall be permitted a ten-minute statement; and Complainant shall be permitted a five-minute rebuttal. At his or her discretion, the Commission Chairperson may allow additional testimony and may extend the time limit for the parties.
- 3. Unless otherwise decided by the Commission, formal rules of evidence shall not apply to the hearing. Commissioners may question each party regarding the allegations. The Respondent(s) and Complainant(s) may not directly question each other.
- 4. If either party fails to appear and the Commission did not grant the party a continuance or reschedule the matter under Chapter IV, Section I.E, then the Commission may make a decision in the party's absence.
- 5. Except when a complaint is staff-initiated or initiated pursuant to section 67.35(d), the Executive Director's role at the hearing will be limited to providing the report containing the legal and factual basis for his or her recommendation to the Commission and to respond to questions from the Commissioners.

**B. Deliberations and Findings.**

1. The Commission shall deliberate in public. Public comment on the matter shall be allowed at each hearing, in accordance with the Sunshine Ordinance and the Brown Act.

2. In determining whether a violation of the Sunshine Ordinance occurred, the Commission must conclude that, based on a preponderance of the evidence, the Respondent committed a violation of the Sunshine Ordinance. The Commission shall consider all the relevant circumstances surrounding the case.

3. The votes of at least three Commissioners are required to make a finding that a Respondent has committed a willful violation of the Sunshine Ordinance or that a Respondent has committed a non-willful violation of the Sunshine Ordinance. The finding of a willful violation or non-willful violation of the Sunshine Ordinance shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings.

**C. Ethics Commission Orders.**

1. If the Commission finds that an elected official or a department head willfully violated the Sunshine Ordinance, the Commission shall so inform the Respondent's appointing authority, or the Mayor if Respondent is an elected official. In addition, the Commission may issue orders requiring any or all of the following if it finds that an elected official, a department head, or any City officer or City employee committed a violation of the Sunshine Ordinance:

a. the Respondent to cease and desist the violation and/or produce the public record(s); and/or

b. the Executive Director to post on the Ethics Commission's website the Commission's finding that the Respondent violated the Sunshine Ordinance; and/or

c. the Executive Director to issue a warning letter to the Respondent and inform the Respondent's appointing authority, or the Mayor if the Respondent is an elected official, of the violation.

2. After making its decision, the Commission will instruct staff to prepare a written order reflecting the Commission's findings. The Chairperson shall be authorized to approve and sign the Commission's written order on behalf of the full Commission.

3. After issuing an order or instructing the Executive Director to act, the Commission will take no further action on the matter.

**D. Finding of No Violation.**

If the Commission determines that there is insufficient evidence to establish that the Respondent has committed a violation of the Sunshine Ordinance, the Commission shall publicly announce this fact. The Commission's announcement may, but need not, include findings of law and fact. Thereafter, the Commission will take no further action on the matter.

## CHAPTER FOUR

### I. MISCELLANEOUS PROVISIONS

#### A. Ex Parte Communications.

Once a complaint is filed with the Commission, no Commissioner shall engage in oral or written communications outside of a Commission meeting regarding the merits of the complaint with the Commission's staff, the Respondent(s), the Complainant(s), any member of the Task Force, the Supervisor of Records, any member of the public, or any person communicating on behalf of the Respondent(s), Complainant(s), the Supervisor of Records, or any member of the Task Force, except for communications, such as scheduling matters, generally conducted between a court and a party appearing before that court.

#### B. Access to Complaints and Related Documents and Deliberations.

Complaints, investigative files and information contained therein, shall be disclosed as necessary to the conduct of an investigation or as required by the California Public Records Act or the San Francisco Sunshine Ordinance. In order to guarantee the integrity of the investigation, internal notes taken by the Executive Director or his or her staff regarding complaints shall not be disclosed until the Commission has issued its final decision following the hearing.

#### C. Oaths and Affirmations.

The Commission may administer oaths and affirmations.

#### D. Selection of Designee by the Executive Director.

Whenever the Executive Director designates an individual other than a member of the Commission staff to perform a duty arising from the Charter or these Regulations, the Executive Director shall notify the Commission and the public of the designation no later than the next business day.

#### E. Extensions of Time and Continuances.

1. Any Respondent or Complainant may request the continuance of a hearing date in writing. The requester must deliver the written request to the Commission Chairperson, and provide a copy of the request to all other parties no later than ten business days before the date of the hearing. The Commission Chairperson shall have the discretion to consider untimely requests. The Commission Chairperson shall approve or deny the request within five business days of the submission of the request. The Commission Chairperson may grant the request upon a showing of good cause.

2. The Commission or the Commission Chairperson may reschedule a hearing at their discretion for good cause.

At any time a hearing is placed on an agenda regarding a matter under Chapter II or III of these Regulations, four or more members must be in attendance. Otherwise, the hearing shall be continued to the next regular Ethics Commission meeting, unless impracticable.

#### **F. Place of Delivery.**

1. Whenever these Regulations require delivery to the Commission, its members, or the Executive Director, delivery shall be effected at the Commission office.
2. Whenever these Regulations require delivery to a Respondent or Complainant, delivery shall be effective and sufficient if made by U.S. mail, personal delivery or any other means of delivery agreed upon by the parties under Chapter One, section II, subsection K, to an address reasonably calculated to give notice to and reach the Respondent or Complainant.
3. Delivery is effective upon the date of delivery, not the date of receipt.
4. Delivery of documents to the Commission may be conducted via electronic mail after a written request is made and approved by the Executive Director.

#### **G. Page Limitations and Format Requirements.**

Whenever these Regulations impose a page limitation, a "page" means one side of an 8½ inch by 11 inch page, with margins of at least one inch at the left, right, top and bottom of the page, typewritten and double-spaced in no smaller than 12 point type. Each page and any attachments shall be consecutively numbered.

#### **H. Conclusion of Hearing.**

For the purposes of these Regulations, a hearing concludes on the date on which the Commission announces its decision.

#### **I. Complaints alleging both Sunshine Violations and Violations Handled Under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings.**

If a complaint alleges both violations of the Sunshine Ordinance and violations handled under the Ethics Commission's Regulations for Investigations and Enforcement Proceedings, the allegations involving violations of the Sunshine Ordinance shall be handled separately under these Regulations. Staff shall initiate a complaint of the alleged violations of the Sunshine Ordinance under Chapter Three, Section I.A.3 of these Regulations.

J. Certification by participating Commissioner if he or she did not attend proceedings held under Chapter II or III in their entirety.

Each Commissioner who participates in a decision, but who did not attend the hearing in its entirety, shall certify on the record that he or she personally heard the testimony (either in person or by listening to a tape or recording of the proceeding) and reviewed the evidence, or otherwise reviewed the entire record of the proceedings.

## II. SEVERABILITY

If any provision of these Regulations, or the application thereof, to any person or circumstance, is held invalid, the validity of the remainder of the Regulations and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

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# Good Government Guide

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An Overview of the Laws Governing  
the Conduct of Public Officials



2010-11 Edition

Dennis J. Herrera

City Attorney of San Francisco

## Part three: Public records & meetings laws

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"The very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it. Even today, there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it."

— President John F. Kennedy  
Address before the American Newspaper  
Publishers Association, April 27, 1961

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### I. Introduction

Good government in our democracy is premised on informed and engaged citizenship, and our ability to govern can never be better or more effective than laws intended to assure the broadest possible public access to government proceedings and records. The policy objective underlying public records and open meeting laws is that citizens share a fundamental right to access information concerning the conduct of their government, and that governmental entities should make their policy decisions openly and with the full benefit of public participation.

As strongly as we in the City Attorney's Office encourage our clients to be thoroughly familiar with laws governing public records and open meetings, we urge, too, that these laws be embraced in the aspirational spirit of openness, transparency and accountability that animate them. Public service means being ever mindful of the public's right to be informed about and to participate in our democracy. Citizens who petition public officials and employees—whether to share ideas, to criticize, to seek information, or to request public records—deserve respect and appreciation for fulfilling a civic duty no less important to San Francisco's government than our own.

As with almost every area of law, there are no absolutes; exceptions exist in open meetings laws and public records laws to accommodate occasionally competing protected rights of privacy and confidentiality. But these exceptions are generally narrow. Violations of open

government laws are more likely to occur from ignorance or confusion than from deliberate intent. But it is important to understand that even unwitting violations may be legitimately viewed with suspicion. They invite criticism and undermine the credibility of City departments and policy bodies. Also, there can be substantial costs and penalties for violating these laws.

We encourage all policy body members and department personnel to thoroughly familiarize themselves with public records and open meeting laws by carefully reading this part of the Good Government Guide, and by taking part in the trainings that the City Attorney's Office offers. We also encourage City officials and employees to contact the City Attorney's Office in advance whenever they have questions regarding public records or meetings.

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## II. Legal overview

This part of the Good Government Guide is intended to familiarize department heads, City personnel, and members of City boards, commissions, and other bodies with State and local laws governing the public's right of access to City records and meetings conducted by certain City bodies. We address the four major laws that promote open government in San Francisco:

- The California Public Records Act (Govt. Code §§ 6250 et seq.) is the State law governing public access to the records of State and local agencies.
- The Ralph M. Brown Act (Govt. Code §§ 54950 et seq.) is the State law governing meetings of local governmental boards, commissions, and other multi-member bodies.
- The San Francisco Charter imposes additional requirements on the conduct of City boards, commissions, departments, and officials.
- The San Francisco Sunshine Ordinance (Admin. Code Chapter 67) imposes additional requirements on City government affecting both the public's access to records and the conduct of meetings of boards, commissions, and other bodies. The Sunshine Ordinance refers to City boards, commissions and most other multi-member policymaking and advisory bodies as "policy bodies." The Board of Supervisors enacted the Sunshine Ordinance in 1993 and the voters substantially amended it in 1999.

In addition to these four main laws, we address other provisions of State and City law that pertain to open government in San Francisco.

For the convenience of the reader, this part of the Guide provides citations for reference to a number of provisions of law. Our citations to these and other codes are not intended to suggest that they are the only sources of legal authority regarding public records and open meeting issues. Court cases, opinions of the California Attorney General and the City Attorney, and other sources of federal, state, and local law may be relevant to a particular situation.

## A. Open government laws at the state and local levels

There is considerable overlap between State open government laws and City laws, including the Sunshine Ordinance. Where it is helpful, this Guide draws distinctions between State and City law requirements. But often the Guide does not draw such distinctions. Where State and City laws differ, the general rule is that the City must follow the more rigorous standard promoting greater access to public records and meetings of policy bodies. We thus often focus only on that legal standard.

Some public agencies that may be affiliated with but are legally distinct from the City are not subject to the Sunshine Ordinance. These agencies include the San Francisco Unified School District, San Francisco Community College District, San Francisco Redevelopment Agency, San Francisco County Transportation Authority, San Francisco Health Authority, San Francisco Housing Authority, San Francisco In-Home Supportive Services Public Authority, San Francisco Local Agency Formation Commission, San Francisco Parking Authority, and the Treasure Island Development Authority. They are subject only to the Public Records Act, the Brown Act (or other similar open meeting law), and, in some cases, other State laws governing public meetings and public records specific to the agency. But, although the Sunshine Ordinance does not of its own force apply to them, some of these agencies have chosen to follow some or all of its requirements.

## B. Proposition 59

In 2004, California voters adopted Proposition 59, an amendment to Article I, section 3 of the California Constitution. Proposition 59 creates a general constitutional right of access to public records and meetings. But it also states that it does not repeal or nullify existing statutory or constitutional restrictions on access to public records and meetings and does not supersede or modify the right of privacy recognized in the California Constitution. It is therefore not completely clear what impact Proposition 59 has on access to public records and meetings, particularly in San Francisco, where the Sunshine Ordinance already provides for greater openness in government than State law requires. Courts and the Attorney General have generally found that Proposition 59 does not create new rights of public access to records and meetings but instead constitutionalizes existing rights under State law.

The underlying policy of the public records laws is that access to information concerning the conduct of the government's business is a fundamental right of each citizen. Govt. Code § 6250; Admin. Code § 67.1. The parallel purpose of the open meeting laws is to ensure that policy bodies make decisions openly and with the public's participation. Govt. Code § 54950; Admin. Code § 67.1. Proposition 59 thus highlights what both State and City law have long recognized: Conscientious adherence to open government laws is essential to democratic self-governance.

## **C. Underlying principles of open government laws**

The premise of both the Public Records Act and the Sunshine Ordinance is that records in the possession of government generally belong to the people. Absent some specific and limited exceptions, City agencies must make those records available for the public to inspect, copy, or do both. This section outlines the disclosure requirements and procedures mandated by the Public Records Act and the Sunshine Ordinance. It also addresses other provisions of the Sunshine Ordinance or other City laws that make available to the public certain types of information.

## **D. Definition of a public record**

The Public Records Act defines a "public record" very broadly. The definition has three elements:

- Any writing, regardless of physical form or characteristics.
- Containing information relating to the conduct of the public's business.
- Prepared, owned, used, or retained by a state or local agency.

Govt. Code § 6252(e). The first element defines a "record." The second and third elements define what makes the record "public." The Sunshine Ordinance adopts this definition of "public record." Admin. Code § 67.20(b).

The first element of the definition of public record—that it is a "writing"—is immensely expansive. It encompasses any handwriting, typewriting, printing, photostating, photographing, photocopying, transmission by e-mail or fax, and every other means of recording on any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols. Govt. Code § 6252(g). This concept of a writing goes beyond the traditional written form. It may consist of any medium that contains encoded information, such as a computer tape, video recording, cassette recording, voicemail, text message, photograph, or movie. E-mails including attachments are writings within the meaning of the Public Records Act.

The second element of the definition of public record—that it contain information "relating to the conduct of the public's business"—is also expansive, though it has some limits. For example, an employee's grocery shopping list, kept in an office desk drawer, is not a public record because it does not contain information about the workings of City government.

The third element of the definition—that a public record is "prepared, owned, used, or retained by a state or local agency"—is expansive, too. In particular, there may be cases where the City does not own a record that is nonetheless considered a public record. Courts have not definitively resolved the issue, but City officials and employees should assume that work they perform for the City on personal computers or other personal communications devices may be subject to disclosure under the public records laws. Such a record meets the first two elements of the definition of public record; the remaining question is whether, under the circumstances, the law would consider the record prepared or used by the City.

There are a few exceptions to the definition of public record. For example, computer software that the City develops is not a public record. Govt. Code §6254.9(a); Admin. Code § 67.20(b). But the large majority of records in the City's possession are. Legal issues concerning disclosure typically center not on whether the record is a public record, but on whether a specific law authorizes or requires the City to withhold or redact the record.

## **E. The public records request**

In some cases, City personnel may have difficulty recognizing that they have received a public records request or an effort by a member of the public to make a request. The discussion below clarifies when a request triggers the City's obligation to respond.

### **1. Form of request**

A person may make an oral public records request in person or by phone, or submit it in writing by fax, postal delivery, personal delivery, or e-mail. Admin. Code § 67.21(b). Departments must honor oral requests. They may ask but not insist that a request be in writing, to clearly record the timing and content of the request. A sample request form, modeled on the form used by the Clerk of the Board of Supervisors, is found at the end of the Guide.

### **2. Content of request**

A public records request must specify an identifiable record or category of records sought. Govt. Code § 6253(b). The law does not require exactitude in requests, or limit requests to specific records the requester identifies by date, author, and/or recipient. But a request must be sufficiently clear and defined that the department can understand what records are the subject of the request.

The law does not generally allow a requester to look indiscriminately through a department's files where such files are not otherwise made available to members of the public. Accordingly, public records requests may not require access to "all of your records." But public servants should make a conscientious effort to assist requesters in identifying the information or records they seek. Also, neither the Public Records Act nor the Sunshine Ordinance gives a member of the public the right to file a standing request for records that departments may or will create or receive in the future. The Brown Act provides a limited right to file a standing request for future meeting agendas and agenda packets of a policy body. See Section IV(C)(4) below.

A request that a department create a response to a request for information or answer a series of questions is not a public records request, and neither the Public Records Act nor the Sunshine Ordinance requires a department to reply to a series of written questions or interrogatories. Nevertheless, department personnel should make a reasonable effort to assist questioners when public records may exist that would assist in answering written questions.

A public records request need not use special terminology like “this is a public records request” or “this is a request under the Sunshine Ordinance” to be valid. And the use of incorrect terminology, like “this is a Freedom of Information Act request,” does not render the request invalid. The request merely needs to make reasonably clear that the requester is seeking identifiable records from the City. And even if the request does not mention the Public Records Act or Sunshine Ordinance, the City must adhere to the requirements of those laws in responding, unless the requester instructs otherwise.

A public records request need not state the reason for the request, and the City may not demand an explanation as a condition of complying with the request. Govt. Code § 6257.5; Admin. Code § 67.25(c). Further, as a general rule, the City must respond to anonymous public records requests, provided they include information sufficient to allow the City to transmit a response to the requester.

### **3. Types of access to records**

A requester may seek to inspect records, or obtain copies of records, or both. Govt. Code §§ 6253(a), (b); Admin. Code §§ 67.21(a), (b). Typically the request itself, or the surrounding circumstances, will make clear the type of access the requester is seeking. If not, the department may seek clarification from the requester.

## **F. Responding to a public records request**

### **1. Providing assistance to requesters**

The Public Records Act requires departments to assist members of the public to identify records and information that are responsive to the request or purpose of the request, if stated; describe the physical location and information technology in which the requested records exist; and provide suggestions for overcoming any practical basis for denying access to the records or information sought. The department will have satisfied these requirements even if it is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester. Govt. Code §§ 6253.1(a), (b).

If a requester has addressed a request to the wrong department, or if the department that received the request knows that another department may have responsive records, the department that received the request typically should inform the requester of the other department(s) that may have responsive records. Admin. Code § 67.21(c). A department should follow this procedure whether or not it has responsive records.

Further, if most of the information in a requested record is exempt from disclosure, the department must inform the requester of other records, if any, that may contain some of the information the requester seeks. Admin. Code § 67.27(d); see also Admin. Code § 67.25(c).

The City’s general duty to assist requesters does not entitle departments to require the requester to give a reason for the request or explain how the requester will use the records. Departments may not limit access to a public record otherwise subject to disclosure based

on the purpose for which the record is being requested. Cal. Govt. Code § 6257.5. Accordingly, departments should not routinely make such inquiries. But in some cases, particularly where the request is overly broad or unclear, it may be appropriate to ask about the requester's objectives where the inquiry would help the department identify the records and satisfy the request. Admin. Code § 67.25(c).

## **2. Providing a description of records**

The Sunshine Ordinance allows a person to ask a department for information regarding the existence, quantity, form, and nature of records relating to a particular subject. When requested to do so, the department must respond in writing within seven days. Admin. Code § 67.21(c). The Ordinance does not provide for any time extension to comply with such a request. This procedure enables a person to get enough information relating to a subject to make or refine a public records request. It does not require a department to provide an inventory detailing each record that may pertain to a subject or to create a privilege log detailing records the department has withheld from disclosure in response to a request.

## **3. Timely response**

The City must respond to a public records request promptly. Govt. Code § 6253(b); Admin. Code § 67.21(b). There are two types of requests – standard requests, and immediate disclosure requests – with different response deadlines.

### **a. Standard requests: 10 calendar days**

Unless the requester makes an immediate disclosure request, departments must respond to a request to inspect or copy records within 10 calendar days. But in “unusual circumstances,” departments may have up to 14 additional calendar days to respond. The department must inform the requester in writing of the extension within the initial 10-day period, setting forth the reasons for the extension and the date on which a response will be made. Govt. Code § 6253(c). The department need not obtain the requester's consent to invoke an extension of time for one of the specified reasons.

“Unusual circumstances” permitting the extension are limited to the need to do one or more of the following:

- Search for and collect the requested records from facilities separate from the office processing the request.
- Search for, collect, and appropriately examine a voluminous amount of separate and distinct records included in a single request.
- Consult with another department or agency that has a substantial interest in the response to the request.
- As to electronic information, compile data, write programming language or a computer program, or construct a computer report to extract data.

Govt. Code §§ 6253(c). Although departments have 10 days to respond to a standard request, they should respond as promptly as possible and without unreasonable delay. Admin. Code §§ 67.21(a), (b).

**b. Immediate disclosure requests: next business day**

The Sunshine Ordinance requires a faster response for “immediate disclosure requests.” The faster response is required only if the request is in writing. Admin. Code § 67.25(a). In addition, the words “Immediate Disclosure Request” must appear across the top of the request and on the envelope, subject line, or cover sheet transmitting the request. Admin. Code § 67.25(a). These stringent rules for designation of an immediate disclosure request are more than a formality. They are designed to alert departments that an expedited time frame for processing the records request applies.

Immediate disclosure requests must be satisfied no later than the close of business the next business day. Admin. Code § 67.25(a). The department should respond to the requester within that time period by fax or email, if the requester has provided that contact information. If the requester has provided a postal address only, mailing the response within the time period satisfies the deadline. Admin. Code § 67.25(a).

Departments may invoke an extension of no more than 14 calendar days to respond to immediate disclosure requests. Admin. Code § 67.25(b). While the Sunshine Ordinance mentions a 10-day extension period, that provision incorporates an expired provision of the Public Records Act framed in terms of 10 “business days,” which is typically equivalent to 14 calendar days. When the voters amended the Ordinance and created the immediate disclosure request process, the provision of the Act then in effect used 14 calendar days as the maximum time frame for extensions. That provision remains in effect. Gov’t Code § 6253(c). Therefore, we read the Sunshine Ordinance and Public Records Act to allow an extension of up to 14 calendar days to respond to an immediate disclosure request.

If a department invokes the 14-day extension, it must notify the requester by the close of business on the business day following the request. Admin. Code § 67.25(b). A department may invoke the extension on one of the following grounds: (1) the voluminous nature of the records requested, (2) location of the records in a remote storage facility, and (3) the need to consult with another interested department. Admin. Code § 67.25(b). The Public Records Act further permits an extension to compile electronic data, write programming language or a computer program, or construct a computer report to extract data. Govt. Code § 6253(c)(4).

The purpose of the immediate disclosure request is to expedite the City’s response to a simple, routine, or otherwise readily answerable request. For more extensive or demanding requests, the maximum deadlines for responding to a request apply. Admin. Code § 67.25(a). Thus, the requester’s designation of a request as an immediate disclosure request does not automatically make it so. Rather, a department may adhere to the time deadlines governing standard requests – an initial 10-day period for response, plus a possible extension of up to 14 additional days – if the extensive or demanding nature of the request would impose an undue burden on the department to respond immediately.

**c. Description requests: 7 calendar days**

As noted earlier, the Sunshine Ordinance allows a member of the public to obtain a description of the existence, quantity, form, and nature of a department's records on a subject. Such a request is technically not a public records request, though it may easily be confused with one, especially when the description request accompanies a public records request. Departments must respond to description requests within 7 days. The Ordinance does not authorize time extensions for responding to such requests. Admin. Code § 67.21(c).

**d. Calculating time**

If a department receives a public records request after business hours or on a weekend or holiday, it may consider the next business day as the date of receipt. Civ. Code § 10. If a deadline for a response falls on a weekend or holiday, the department may consider the next business day as the deadline for response. Civ. Code § 11.

**e. Duty to produce records incrementally**

Departments must produce records as soon as reasonably possible on an incremental or "rolling" basis, when so requested. Therefore, even when a department has additional time to respond and is collecting a large quantity of records, if requested, it must produce records as it locates and reviews them rather than waiting until it has located and reviewed all potentially responsive records. Admin. Code § 67.25(d). This rule may not apply when, because of the relationship between two records (or sets of records), review of the first is not complete until the department has completed review of the second. If the department must redact a responsive record, review of the record is not complete until the department has made the redaction.

**f. The rule of reason**

In very rare circumstances a public records request or series of requests may become so burdensome, persistent or sweeping that it unreasonably impinges on a department's ability to perform its public duties. In these unusual instances, the department may be able to invoke a "rule of reason" (a common law doctrine occasionally cited in case law) to allocate the amount of time and resources a department devotes to responding. Departments believing that circumstances may warrant invoking this rule are urged to consult with the City Attorney's Office before doing so.

In general, the timing of a department's response must be reasonable in light of all the circumstances, including: the volume of records to be inspected; whether the records are readily available; the need, if any, to assign staff to oversee the inspection; whether the department is actively using the records; and the number of other public records requests to which the department is also responding. Without denying or unreasonably delaying the requested inspection, a department may consider significant disruption of its operations that inspection will cause in determining the timing and logistics of the inspection. In response to a request to inspect a large number of records, the department may afford the requester access to records for a specified amount of time each day if under the circumstances that procedure is reasonable.

Similarly, when responding to a request for copies of excessively voluminous records, a rule of reason may govern the timing of the response. Where compliance with a request may pose serious or insurmountable staffing burdens, the department may allocate a limited number of hours per day or week to work on responding to the request, to minimize disruption of its other public duties. In such circumstances, department personnel should endeavor to work cooperatively with the requester to determine if the request can be narrowed to minimize barriers to a prompt response, or to at least prioritize records the request would like to first retrieve and review first. If the same person makes multiple requests of a department or of the City as a whole, circumstances may likewise warrant allocating a limited number of hours per day or week to the individual's requests.

Because open government laws place such paramount importance on responding promptly to public records requests, a department should never lightly or routinely invoke the rule of reason as a basis for elongating the time for fully responding. Indeed, we strongly advise City personnel against invoking the rule of reason unless they have first consulted with the City Attorney's Office about their particular circumstances.

#### **4. Proper response**

##### **a. The duty to respond**

Departments may not refuse to respond to a public records request. In some circumstances, failure to respond could subject an employee to discipline. In addition, it could lead to a legal action in which the requester could recover attorneys' fees against the City.

Yet sometimes for various good faith reasons departments miss deadlines for responding to public records requests. Once a department realizes it has missed or will miss a deadline, it should expeditiously contact the requester and process the request as quickly as possible.

##### **b. Types of responses**

Following a reasonable search for responsive records, the department must do one of the following: disclose the records; inform the requester in writing that it has no records responsive to the request; or inform the requester in writing that responsive records exist, but that they are exempt from disclosure, stating the legal basis for the exemption. Govt. Code §§ 6253(c), 6255(b); Admin. Code §§ 67.21(b), 67.27. A record may be partially exempt from disclosure, in which case the department will redact the relevant portion of the record and must inform the requester in writing of the legal basis for the redaction. Admin. Code § 67.26.

##### **c. No privilege log required**

The law does not require a responding department withholding records to create a privilege log identifying the withheld records. It is common to prepare a privilege log in a litigation context, but not when responding to a public records request.

#### **d. Information in electronic form**

As a general rule, if a department has no records responsive to a request, the law does not require it to create or re-create one. But the Sunshine Ordinance requires the City to make information stored in electronic form available to a member of the public in any form requested so long as the information is available to or easily generated by the department in that form, including disk, tape, print-out, or on a computer monitor. Admin. Code § 67.21(l). Members of the public do not have a right to inspect public information on a computer monitor where the information visible on the monitor is inextricably intertwined with information that is properly exempt from disclosure. Admin. Code § 67.21(l). But departments must produce in an appropriate form the publicly disclosable information. With limited exceptions, the Sunshine Ordinance does not require a department to program or reprogram a computer to produce an electronic record. Admin. Code § 67.21(l).

But the Legislature has amended the Public Records Act to impose additional requirements about information that is in an electronic format. Govt. Code § 6253.9. A department must make the information available in any electronic format in which it holds the information. Govt. Code § 6253.9(a)(1). And it must make a copy of an electronic record available in the format requested if it has used that format to create copies for its own use or for other agencies. Govt. Code § 6253.9(a)(2). These provisions do not require a department to reconstruct a record in an electronic format if the record is no longer available electronically. Govt. Code § 6253.9(c).

#### **i. Portable Document Format, or PDF**

To facilitate accessibility and ease of use, many City departments provide their electronic records to the public as PDF files. PDF, which stands for "Portable Document Format," is a file format created by Adobe Systems in the early 1990s to facilitate the exchange electronic documents across multiple operating systems, and without requiring the purchase of specific software or hardware. PDF is now an open standard, meaning it is available without charge, is non-proprietary, and can be accommodated by different software. The advantages of providing records in this format are that:

- PDF is a free, open format
- PDF records are viewable and printable on any computer platform
- PDF records typically look like the original records and thus preserve the integrity of the original information
- PDF records can enable full-text searches to locate words and terms features in PDF documents that are saved in electronic format
- PDF records work with assistive technologies to make the information available to persons with disabilities

#### **ii. Metadata**

Sometimes a requester seeks a record in its original electronic format, which likely involves proprietary software, such as Microsoft Word or Excel. In such instances, it is usually the case that the electronic document will contain embedded, hidden information known as

"metadata." Metadata may include information about the document's authors and editors; comments shared among co-authors and editors; and tracked changes in versions of the document before its completion. This metadata may not be readily apparent in the final document, but it may nonetheless be fully available to the recipient were the document provided in its native file format. Depending on the nature of the record requested, some or all of the metadata it contains may be properly exempt from disclosure. In still other instances—including comments that may contain legal advice, medical, personnel or otherwise private information—the disclosure of metadata may actually be prohibited by law.

While current case law offers little guidance on legal questions relating to public disclosure of metadata, and while technologies continue to evolve quickly, there is no evidence that the California Legislature intended to require public entities to search and redact metadata in electronic records. Neither is there an apparent legislative intent to require government agencies to produce records in their electronic formats if their release would jeopardize or compromise the security or integrity of the original records, or of any proprietary software in which it is maintained. Govt. Code § 6253.9(f).

At the same time, the usability of public information provided to requesters is something that department personnel should consider in responding to public records requests. In asking for a public record in a native file format like Microsoft Excel, for example, a requester may simply be seeking a format that will enable searching, querying and summarizing public information in a manner that is far easier than if the record were provided in a scanned PDF or on a printed page. In some instances, the very same technology innovations that can present difficult public records questions may help resolve these issues through conversion to file formats that both meet the requester's needs and avoid problems with unauthorized disclosure of metadata. Departments seeking further advice on these issues should consult with their department's information technology staff and with the City Attorney's Office.

The San Francisco Board of Supervisors has adopted a policy directing its clerk to provide responsive records in the original format when the requester so requests. Other departments may wish to consider their own policy options in light of the risks of unintended or impermissible disclosure of metadata in documents specific to their own department's function. Again, departmental personnel seeking further advice on the topic of providing electronic records to members of the public should consult with their information technology staff and the City Attorney's Office.

### iii. Fee for duplicating electronic records

The fee for duplicating electronic records is limited to the direct cost of producing copies in an electronic format. Govt. Code § 6253.9(a)(2). The Public Records Act amendment regarding electronic records imposed additional duties on local governments, beyond those that the Sunshine Ordinance imposes on the City, that may be charged to the requester. The requester pays the additional cost of producing a copy of the record, including the cost of constructing the record and of programming and computer services necessary to produce a copy, if (1) the department is required to produce a copy but the record is ordinarily produced only at otherwise regularly scheduled intervals, or (2) the

request would require data compilation, extraction, or programming to produce the record. Govt. Code § 6253.9(b).

#### **iv. Back-up files**

As a general rule, departments need not search their back-up electronic files in response to a public records request. Back-up tapes serve the limited purpose of providing a means of recovery in cases of disaster, departmental system failure, or unauthorized deletion. They are not available for departmental use except in these limited situations. Electronic records such as e-mails that an employee has properly deleted under the department's records retention and destruction policy but that remain on back-up tapes are analogous to paper records that the department has lawfully discarded but may be found in a City-owned dumpster. Neither the Public Records Act nor the Sunshine Ordinance requires the City to search the trash for such records, whether paper or electronic.

#### **v. Information on personal communications devices**

Neither the Public Records Act nor the Sunshine Ordinance directly addresses whether communications sent or received on personal electronic devices such as cell phones and personal computers are subject to disclosure as public records. Courts have not definitively resolved this issue. Out of an abundance of caution, City officers and employees should assume that records pertaining to City business on their personal electronic devices may be public records subject to disclosure. In some circumstances, courts might have difficulty concluding that such electronic records are not public records.

Even if the Public Records Act covers records on personal communications devices, this does not mean that officers and employees must retain such communications. Personal electronic devices may have limited storage capacity, and communications on them, if deemed to be public records, would be subject to the department's records retention policy. See Section III below. These policies do not require retention of all public records, but only certain types of records as specified in State and local law. Examples of public records that the law does not require the City to retain include but are not limited to routine messages or e-mails, miscellaneous correspondence not requiring follow-up, notes, and preliminary drafts that have been superseded. For a more thorough understanding of records retention requirements, City officers and employees should consult their department's record retention policy and this Guide's discussion of records retention issues.

### **5. Fees**

#### **a. No fees for records search**

Departments may not charge a fee for the time and costs incurred in searching for, locating, or collecting records to respond to a public records request. Govt. Code § 6253(b); Admin. Code § 67.26.

**b. No fees for redacting exempt information**

Departments may not charge a fee for the time and costs incurred in redacting exempt information from a record to be disclosed in response to a public records request. Govt. Code § 6253(b); Admin. Code § 67.26.

**c. No fees for inspecting records**

Departments may not charge a fee for a requester to inspect records. Admin. Code § 67.28(a). In some circumstances, a department may deploy staff to sit with requesters while they inspect records, to ensure the security of the records. The department may not charge a fee for this use of staff time. If the department has to make a new copy of a record for the requester to inspect because redactions have been made in the original, the department may not charge a fee for that inspection copy.

**d. Fees for copies**

Departments may charge a fee for the duplication and mailing of copies of records. Govt. Code § 6253(b). Departments may require payment before providing the copies. For records routinely produced in multiple copies for distribution, such as copies of an agenda reproduced for a meeting, a department may charge 1¢ per page, plus postage. Admin. Code § 67.28(b). For records assembled and copied to the order of the requester, a department may charge no more than 10¢ per page. Admin. Code § 67.28(c). A record that a department originally reproduced in multiple copies, but now must again reproduce in response to a public records request, such as the agenda for a past meeting of a policy body, is subject to the higher charge. A department may establish higher copying fees only if it prepares and posts an itemized cost analysis establishing that the per page direct cost exceeds the above amounts. Admin. Code § 67.28(d).

Where the requester seeks a copy of a record on a medium other than paper, the City may charge for the cost of the medium on which the information is duplicated. Admin. Code § 67.21(f). A department may charge up to \$10 for video copies of video recorded meetings. Admin. Code § 67.28(e). There is no specific dollar limit on the charge for audio copies of audio recorded meetings, but, as with video copies or any other non-paper medium, the charge may not exceed the cost of the medium on which the information is duplicated.

**e. Fees for other services**

Departments may charge for services other than duplicating, such as providing certified copies of documents. We recommend consulting the City Attorney's Office if questions arise regarding possible conflicts between fees that the Sunshine Ordinance authorizes and those that State law or other ordinances authorize.

## **G. Exemptions from disclosure**

The Public Records Act exempts certain classes of records from disclosure. The Sunshine Ordinance limits the City's ability to claim some of these exemptions. Interpreting these

exemptions may present complex legal and factual questions that require consultation with the City Attorney's Office.

Both the Public Records Act and the Sunshine Ordinance create a general right of public access to public records. Therefore, the law always imposes the burden on the City to justify its refusal to disclose a record by specifying the legal basis. Govt. Code § 6255(b); Admin. Code §§ 67.27(a)-(c).

Some records contain both exempt and non-exempt information. A department may not withhold an entire record unless all the information in it is exempt. Admin. Code § 67.26. The department must redact the exempted material and annotate the redacted text by referring to the provision of the Public Records Act, Sunshine Ordinance, or other law authorizing the refusal to disclose. Admin. Code § 67.26. As previously noted, the department may not charge the requester a fee for redacting the information. Admin. Code § 67.26.

Some grounds for nondisclosure commonly arise. Below we discuss some of these. We do not discuss all the exemptions available under State and federal law; many apply only to specialized types of records and some rarely apply. Some exemptions stem from the Public Records Act itself. The Act also catalogues alphabetically many exemptions derived from other State laws, but this list is not exhaustive. Govt. Code §§ 6276.02-6276.48, 6275.

The exempt status of a record generally means that a department may but need not decline to disclose it. In other instances, such as where State or federal constitutional privacy interests of individuals or a statutory ban is involved, the department must not disclose a record even if it wishes to do so. Departments that have questions about whether they must invoke an exemption, or may choose not to, should consult the City Attorney's Office.

If a department voluntarily discloses a record that it may withhold, it waives its privilege to withhold the record in the future. Govt. Code § 6254.5. Departments may not disclose a record to one member of the public and withhold that record from another member of the public. But certain types of disclosures – for example, to another governmental entity, or if otherwise required by law – do not necessarily require disclosure of that same record to a member of the public. Govt. Code §§ 6254.5(b), (e). And if the department has inadvertently compromised a third party's rights by disclosing a record it should have withheld, it may not compound the error by making the same wrongful disclosure to another member of the public.

Individual employees generally lack the authority to waive a privilege to withhold a record. Depending on the circumstances, only the policy body that oversees the department, the department head, or other authorized personnel may make such a decision. Unauthorized disclosure of a privileged record is official misconduct and may subject the person who made the disclosure to disciplinary action or criminal prosecution, or both. Campaign & Govt. Conduct Code §§ 3.228, 3.242.

## **1. Exemption under state or federal law**

The United States Constitution, the California Constitution, and federal or State statutes and regulations exempt or prohibit disclosure of certain records. The Public Records Act

incorporates these laws in an exemption. Govt. Code § 6254(k). Under this exemption, where disclosure would violate a federal or State law, the City may not release the record. Where federal or State law does not prohibit disclosure of a record but authorizes nondisclosure, the City may decide whether to disclose.

## **2. Privacy**

Both state and local law recognize as a general principle that the right to personal privacy sometimes precludes disclosure of public records or information contained in those records. Govt. Code §§ 6250, 6254(c); Cal. Const., Art. I, §1; Admin. Code §67.1(g); Admin. Code Chapter 12M. These authorities may protect private information or records from disclosure even absent a statutory or constitutional provision addressing the specific information or type of record in question.

Some laws ban disclosure of information based on the privacy interests of individuals. For example, Welfare and Institutions Code § 10850 makes confidential records that concern individuals who receive certain public social services. In other circumstances, the bar to disclosure, while not absolute, is still high. In these cases, departments must determine whether disclosure serves a sufficiently significant public purpose to warrant release of the record and the attendant compromise of an individual's privacy. The level of the bar will depend on the strength of the privacy interest. Where the privacy interest is relatively weak, a weaker justification for disclosure in the public interest may suffice.

### **a. Privacy interests of city employees and officials**

Departments must not disclose "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Govt. Code § 6254(c). But all personnel records are not automatically exempt. As a general rule:

- Members of the public are entitled to see records that contain a City employee's name, current or past job classification, current or past job assignment, and actual wages earned including overtime. Admin. Code §§ 67.24(c)(3), (4). There may be narrow exceptions to this general rule; for example, in limited circumstances some of this information for certain peace officers possibly may be withheld for safety or security reasons.
  - The City must disclose the amount, basis, and recipient of any performance-based increase in compensation or benefits or any other bonus that it awards to any employee. Admin. Code § 67.24(c)(6).
  - The City must disclose the job pool characteristics and employment and education histories of all job applicants who accepted employment with the City. Admin. Code §§ 67.24(c)(1), (2).

But, because of the right to privacy, as a general rule the City may not disclose personal information about employees such as home address, telephone numbers, personal e-mail address, age, date of birth, race or ethnicity, sex, and marital status. Disclosure of an employee's social security number is strictly prohibited. Govt. Code § 6254.29. Further, certain types of personnel records generally may not be disclosed. For example:

- The law generally considers a supervisor's performance evaluation of an employee a private matter that is not subject to disclosure.
- Generally the City must not disclose records containing medical or disability information about employees. Federal and state statutes provide broad protection for such information.
- Peace officer personnel records receive special protection under State law. Pen. Code §§ 832.7, 832.8.

Records concerning discipline of specific City employees, or circumstances that might warrant their discipline, often pose difficult issues. To the extent permitted by law, the Sunshine Ordinance requires the City to disclose records of an employee's confirmed misconduct involving personal dishonesty, misappropriation of public funds, resources, or benefits, unlawful discrimination, abuse of authority, or violence. Admin. Code § 67.24(c)(7). Whether the employee's misconduct is confirmed, and whether it is the type of misconduct addressed by the Ordinance, is sometimes unclear. The Ordinance does not directly address the treatment of unresolved or uninvestigated complaints against employees; complaints resolved in the employee's favor; or records of ongoing personnel investigations. We recommend that departments faced with requests for such records consult the City Attorney's Office. The privacy issues pertaining to these types of personnel records can be complex, and other considerations in addition to privacy, such as the need to maintain effective investigations, may be relevant.

The law protects the privacy of City officials as well as City employees. For example, the City should not, without a commissioner's consent, disclose that commissioner's personal e-mail address, even if the commissioner has disclosed it to commission staff. But departments should make available a City e-mail address at which members of the public may contact City officials, including commissioners. As another example, the Public Records Act strictly prohibits posting on the internet the home address or phone number of any elected or appointed official, defined broadly to include not merely the Mayor and members of the Board of Supervisors but many others, including active and retired peace officers. Govt. Code §§ 6254.21, 6254.24.

#### **b. Privacy interests of members of the public**

The statutory and constitutional protections for privacy apply to information in City records about members of the public. To take the most obvious example, a patient in a City hospital or health clinic has medical privacy rights that the public records laws cannot override. Similarly, departments may not disclose medical information pertaining to a disability that an individual submits to the City in connection with a request for access to a City building or modification of a City program, unless the individual consents to the disclosure.

Concerns about identity theft warrant redaction of driver's license numbers, credit card numbers, checking account numbers, and similar information in records of transactions between the City and members of the public. In some circumstances, the law affords greater privacy protection for financial information about private individuals in City records than for comparable information about City employees; but the general rule is that

records of distribution of City funds to private persons, like salary payments to City employees, are subject to disclosure.

Although the comparison is not always exact, usually the types of personal information about employees and officials that the City may not disclose will parallel the personal information about members of the public that the City may not disclose. For example, the general rule is that departments should not disclose home addresses, personal phone numbers, or personal e-mail addresses of members of the public. Such personal contact information typically sheds no light on the operations of City government.

But there may be some circumstances in which knowing the location of a person's home is relevant to the public's ability to monitor the operations of government, for example, because of the proximity of the home to a site that is the subject of a City decision. And there may be circumstances where people do not have a reasonable expectation of privacy in contact information they have provided to the City, for example, based on notices on a department's forms or website. If a department is inclined to disclose contact information for private individuals or other information about members of the public of a personal nature, we recommend that the department consult the City Attorney's Office.

### **3. Pending litigation**

A department may decline to disclose records relating to and developed during pending litigation to which the City is a party, until the litigation is finally adjudicated or otherwise settled. Govt. Code § 6254(b). But the City must disclose claims filed against it. Admin. Code § 67.24(b)(1)(i). Departments receiving requests for records relating to pending litigation should immediately contact the Deputy City Attorney handling the litigation.

### **4. Attorney-client communication**

A department may decline to disclose any privileged communication between the department and its attorneys. State law makes communications between the City Attorney's Office and City officials and employees privileged and confidential. Govt. Code §§ 6254(k), 6276.04; Evidence Code §§ 950 et seq.

The Sunshine Ordinance requires disclosure of advice memoranda regarding the California Public Records Act, the Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or the Sunshine Ordinance. Admin. Code § 67.24(b)(1)(iii). At the same time the Charter and State law create attorney-client relationships between the City Attorney and City officials. Charter § 6.102. There may be instances where public disclosure of an attorney-client communication may conflict with the Charter and State law. We recommend that departments that receive requests for attorney-client communications consult with the City Attorney's Office.

The attorney-client privilege belongs to the client, not the attorney. Thus, records in the City Attorney's possession covered by the privilege must remain confidential unless the client – the City – consents to their disclosure. Bus. & Prof. Code § 6068(e). By the same token, with the City's authorization a department may disclose records in its possession

covered by the privilege. We recommend that departments consult with the City Attorney's Office before releasing records of privileged attorney-client communications.

## **5. Attorney work product**

Records that contain the work product of an attorney representing the City are protected from disclosure. Govt. Code §§ 6254(k), 6276.04; Code Civ. Proc. §2018.030. The attorney work product doctrine functions as a privilege, protecting from disclosure "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." Code Civ. Proc. § 2018.030(a). This privilege may also extend to other records relating to the legal work of attorneys representing the City, including documents prepared at the request of attorneys, such as reports by investigators, consultants, and other experts.

The attorney work product privilege is distinct from the attorney-client privilege and can cover records that the attorney-client privilege does not. And, unlike the pending litigation exception, the attorney work product privilege extends beyond records prepared for litigation purposes. Where the privilege applies to litigation records, it does not lose its force at the conclusion of litigation.

## **6. Informants, complainants, and whistleblowers**

In some circumstances, departments may shield from disclosure the identity of persons complaining to the City about violations of law. Evidence Code § 1041. Privacy or other grounds may also authorize or require nondisclosure, even where the complaint does not allege a violation of law. Govt. Code § 6254(c). Substantial public interests warrant withholding the identity of complainants. When, for example, a tenant complains about a landlord, a neighbor about a neighbor, an employee about an employer, or a citizen about a person making a public disturbance, disclosure of the identity of the complainant, the complaint, and/or the investigation could lead to retaliation against or harassment of the complainant and could also compromise the investigation. Under those circumstances the City may be able to withhold or redact the complaint and record of the investigation. See generally Evidence Code § 1040.

In addition, the City may protect from disclosure the identity of whistleblowers complaining about City officers' and employees' wasteful, inefficient, or improper use of City funds or other improper activities, as well as the content and investigation of those complaints. Charter §§ C3.699-13(a), F1.107(c); Campaign & Govt. Conduct Code §§ 4.120, 4.123. Central to the effectiveness of the City's whistleblower program is the public's understanding that the City will treat whistleblower complaints in a confidential manner to the extent permitted by law.

Finally, the constitutional right to petition the government for a redress of grievances, or to engage in anonymous protest speech, may in some circumstances protect the identity of complainants.

## **7. Trade secrets**

Under certain circumstances, the law protects trade secrets from disclosure. Govt. Code § 6276.44; Civil Code §§ 3426, 3426.7(c); Evidence Code § 1060. Different types of information, including proprietary financial data, may constitute a trade secret. Several provisions in the Public Records Act address narrow categories of trade secrets or other proprietary information. See, e.g., Govt. Code §§ 6254.2 (pesticide safety and efficacy information), 6254.7 (certain air pollution data), 6254.15 (corporate financial information regarding location, expansion, and retention of corporate facilities in California).

But trade secret issues more likely will arise in a variety of business, contractual, and land use contexts not specifically addressed in the Public Records Act. A request for records that a company deems to be trade secrets can pose difficulties for the City, which must evaluate rather than take at face value the company's claim that the records are bona fide trade secrets. A department facing a records request that may contain trade secrets should consult the City Attorney's Office.

## **8. Investigative and security records**

The Public Records Act exempts from disclosure records of complaints to, investigations conducted by, intelligence information or security procedures of, and investigatory or security files compiled by, local police agencies. Govt. Code § 6254(f). The City must disclose certain information in files covered by this exemption, but not the files themselves. This exemption also covers investigatory or security files compiled by non-police agencies for correctional, law enforcement, or licensing purposes.

The "law enforcement" feature of this exemption generally precludes its application to records of civil or administrative investigations conducted to determine compliance with ordinances. But the exemption for investigatory files that the City compiles for licensing purposes has broad reach given the range of permitting decisions that departments and policy bodies make. A separate exemption covers personal financial data that an applicant submits to qualify for a permit or license. Govt. Code § 6254(n).

For more information on security matters generally, see the memorandum entitled, "Guidelines for Redacting Information from Plans Created by the City to Anticipate and Respond to Emergencies Created by Terrorist or Other Criminal Activity" (September 15, 2006) on the City Attorney's website.

## **9. Other exemptions**

The Public Records Act creates many other exemptions for specific types of records. Among these are records containing testing information pertaining to applications for public employment, Govt. Code § 6254(g); real estate appraisals, Govt. Code § 6254(h); library circulation records, Govt. Code § 6254(i); and records containing utility customer data, Govt. Code § 6254.16. There are many more, often narrow in scope and obscure.

Sometimes departments have legitimate programmatic or policy concerns with disclosing a record, but are not aware of an applicable exemption. In these circumstances, consultation

with the City Attorney's Office is appropriate. Given the emphasis on disclosure in our public records laws, there may be no applicable exemption. But in some cases there may be an exemption that is available to address the department's concerns.

## **H. Contracts and related records**

The Sunshine Ordinance sets forth detailed rules governing disclosure of contracts and related materials. The City must disclose such records at least to the extent required by State law, but in certain respects the Ordinance affords the public greater access to these records than does State law. We summarize below the general disclosure rules applicable to contracts and related materials, and then discuss special rules that apply to sole source service contracts, certain leases and permits, and franchise agreements. Given the variety and in some cases complexity of City contracts, questions may arise that we do not answer below. For those, we recommend that departments consult the City Attorney's Office.

### **1. General rules**

#### **a. Mandatory post-award disclosure**

Except as noted below, contracts, contractors' bids, responses to requests for proposals ("RFPs"), and all other records of communications between departments and persons or firms seeking contracts must be available for public inspection immediately after the City awards the contract. Admin. Code § 67.24(e)(1). When a department receives proposals in response to an RFP, but does not award a contract, it is not required to make the proposals public.

Though not specifically mentioned in the Sunshine Ordinance, responses to requests for information ("RFIs") and requests for qualifications ("RFQs") are subject to the same general rules for disclosure. Because responses to RFIs and RFQs typically precede the issuance of an RFP, questions may arise concerning the timing of disclosure of those responses and other records relating to the responses. Where such questions arise, we recommend that departments consult the City Attorney's Office.

#### **b. Notice of disclosure requirements**

The Sunshine Ordinance requires departments to inform bidders, proposers, and contractors that contract-related information they provide to the City will be subject to public disclosure on request, including, as discussed below, financial information the successful bidder or proposer submitted. Admin. Code § 67.24(e)(1).

#### **c. Financial data**

Departments may refuse to disclose proprietary financial information in records regarding an unsuccessful bidder or proposer including information on net worth. Admin. Code § 67.24(e)(1). Departments may withhold proprietary financial data about the winning bidder or proposer until the final approval authority in the City awards the contract. Admin. Code § 67.24(e)(1). Departments must make such information public upon award of the contract, unless other State or federal law prohibits such disclosure.

Admin. Code § 67.24(e)(1). In some instances (for example, under the federal Transportation Regulations for Disadvantaged Business Enterprises), State or federal law may forbid the City from disclosing the personal net worth and related records of successful bidders or proposers.

**d. Records relating to negotiation strategy**

As a general rule, departments may withhold from disclosure preliminary drafts, memoranda, notes, and other records containing recommendations relating to the City's negotiating strategy, that the City has not provided to a prospective contractor or other third party. See generally Admin. Code §§ 67.24(a)(1), 67.24(e)(1), 67.24(e)(3). Disclosure of such records to the public would mean that the party or parties with whom the City is negotiating may also obtain copies. The Sunshine Ordinance does not mandate such disclosures.

**e. Score sheets and other evaluation materials for proposals**

The Sunshine Ordinance mandates disclosure of certain records relating to RFPs. After completion of any review, evaluation, or rating of responses to an RFP, the City must make available for public inspection the names of scorers and evaluators, with their individual ratings, comments, and score sheets, and other materials used in the evaluation process. Admin. Code § 67.24(e)(1). The proposals that the panelists evaluate are not "other materials used in the evaluation process" and need not be disclosed at this stage in the contracting process. Proceedings of RFP selection panels are closed to the public.

**f. Draft contracts**

Departments may refuse to disclose draft versions of contracts during the negotiating process. But they must preserve these drafts and make them available for public inspection 10 days before presentation of the agreement to the policy body responsible for approving the agreement. Admin. Code § 67.24(a)(2). The 10-day rule does not apply where the policy body finds and articulates how the public interest would be unavoidably and substantially harmed by compliance with that rule. Admin. Code § 67.24(a)(2). Further, in the case of negotiations for a contract, lease, or other business agreement in which a City agency is offering to provide facilities or services in direct competition with other public or private entities that are not required to or do not make their competing proposals public, the policy body may postpone public access to the final draft agreement until the City agency presents the draft to it for approval. Admin. Code § 67.24(a)(2).

**g. Other exemptions**

Departments are not required to disclose contract-related records that federal or State law protect from disclosure or that fall within specific exemptions under the Public Records Act and Sunshine Ordinance. For example, privileged attorney-client communications, even if contract-related, are not subject to disclosure.

## **2. Sole source service contracts, certain leases and permits, and franchise agreements**

Special rules govern disclosure of records exchanged between the City and another party during negotiation of the following types of contracts:

- Contracts for personal, professional, or other contractual services – if not subject to a competitive process, or where such process has arrived at a stage where there is only one qualified responsive bidder.
- Leases or permits – having total anticipated revenue or expense to the City of \$500,000 or more, or for a term of 10 years or more.
- Franchise agreements.

For these types of contracts, departments must make available to the public upon request documents exchanged during negotiations relating to the positions of the parties, including drafts or portions of drafts of agreements. If the City does not prepare a record of the negotiations, or the record does not provide a meaningful representation of the positions of the parties, the Deputy City Attorney or other City representative familiar with the negotiations, upon written request from a member of the public, must prepare a written summary of the respective positions of the parties in the negotiations. The summary must be prepared within five business days of the final day of negotiations for the week. Admin. Code § 67.24(e)(3).

## **I. Enhanced access to public records under the Sunshine Ordinance**

The Sunshine Ordinance limits the ability of City departments to invoke certain exemptions available under the Public Records Act and requires disclosure of certain types of records. We discuss below major features of the Ordinance that provide enhanced access to public records and that are not discussed elsewhere in this Guide.

### **1. General balancing prohibited**

In addition to enumerating specific exemptions, the Public Records Act includes a general “public interest” balancing exemption. This exemption allows the government agency to refuse to disclose records where, on the facts of the particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Govt. Code § 6255(a). The Sunshine Ordinance prohibits the City from withholding or redacting records under this balancing exemption. Admin. Code § 67.24(g).

### **2. Deliberative process privilege unavailable**

Under the general public interest balancing exemption of the Public Records Act, an agency may decline to disclose records based on the “deliberative process privilege.” This privilege applies where the agency can demonstrate that disclosure of records would

discourage candid discussion in the agency, undermining its decisionmaking process and its ability to perform its functions. The Sunshine Ordinance prohibits the City from withholding or redacting records based on this privilege. Admin. Code § 67.24(h).

### **3. Budget and financial records are public**

The Sunshine Ordinance requires the City to disclose budgets, whether tentative, proposed, or adopted, for the City or any department, program, project, or other category. Admin. Code § 67.24(f). The City must disclose all bills, claims, invoices, vouchers, or other records of payment obligations, and records of actual disbursements, showing amount paid, payee, and purpose of payment. But records of payments for social or other services that are confidential by law are exempt from disclosure. Admin. Code § 67.24(f).

### **4. Confidential litigation settlement provisions are prohibited**

The Sunshine Ordinance prohibits the City from entering into confidential settlements of litigation. Admin Code § 67.12(b)(3).

## **J. Additional public information requirements**

The Sunshine Ordinance and other provisions of City law enhance transparency in government by requiring departments to follow certain practices that facilitate the public's access to information. We highlight below the major provisions that this Guide does not discuss elsewhere.

### **1. Oral public information**

Each department head must designate a knowledgeable person or persons who can answer questions regarding departmental operations, plans, policies, and positions. Admin. Code § 67.22(a). The department head may but is not required to serve in this capacity. Admin. Code § 67.22(a). The designated person must respond to inquiries, provided that no more than 15 minutes is required to obtain the information responsive to the inquiry. Admin. Code § 67.22(c). Whether by designating an alternate or multiple employees for this task, the department head should assure that someone is always available to provide oral information to the public.

Both the U.S. and California Constitutions explicitly provide for the right of the people to petition their government for redress of grievances, and practitioners of good government should make every effort to be accountable and responsive to the citizens they serve. But neither these constitutional guarantees nor the Sunshine Ordinance assure members of the public the right to interview, debate, or engage in lengthy discussions the employees or officials of their choosing. At the same time, none of these laws curtails informal informational discussions between employees and members of the public, if such contacts are acceptable to the employee and the department, not disruptive of departmental

operations, and do not violate other laws, such as those governing public meetings. Admin. Code § 67.22(b).

## **2. Public review file**

The Clerk of the Board of Supervisors and the clerk or secretary of each board and commission enumerated in the Charter must maintain a public review file open for public inspection during normal business hours. Admin. Code § 67.23(a). This requirement does not apply to other policy bodies. The public review file must contain copies of communications that the clerk or secretary has distributed to or received from a quorum of the body concerning any matter on its meeting agendas within the previous 30 days or likely to be on a meeting agenda of the body within the next 30 days. Admin. Code § 67.23(a). This requirement does not apply to exempt materials, commercial solicitations, or periodical publications. Admin. Code § 67.23(a).

The clerk or secretary must maintain the public review file in chronological order for communications sent or received in the immediately preceding three business days. Admin. Code § 67.23(b). After a document has been on file for two days, it may be removed and placed in the monthly chronological file. Admin. Code § 67.23(b). The clerk or secretary need not put lengthy, multi-page reports attached to these communications in the chronological file if the file contains a letter or memorandum of transmittal referencing the report. Admin. Code § 67.23(c).

## **3. Annual reports**

City boards, commissions, and departments must prepare an annual report. Charter § 4.103; Admin. Code § 2A.30. The annual report should contain a summary of the services and programs of the board, commission, or department, presented in terms and format accessible to the average citizen, and may include highlights and achievements of the prior year. Admin. Code § 1.56(a).

Boards, commissions, and departments that produce an annual report must post it on the City's website and transmit the Uniform Resources Locator (URL) to the Public Library within 10 days of final approval of the report. Admin. Code § 1.56(b); see also Admin. Code § 8.16. Where the law does not set the date for submitting the report, the board, commission, or department must notify the clerk of the Board of Supervisors in writing of the date by which the report will be posted. Admin. Code § 1.56(c).

City departments may not use City funds to print the annual report, absent prior approval by the Board of Supervisors. Admin. Code § 1.56(d). City officials or employees may print the report from the website or maintain hard copies of the report pursuant to a records retention policy. Admin. Code § 1.56(d). At the request of a member of the public, the board, commission, or department, or the Library, must promptly print or assist in arranging the printing of the report from the website. Admin. Code § 1.56(d).

#### **4. Annual lists of sole source contracts**

At the end of each fiscal year, departments must provide to the Board of Supervisors a list of all sole source contracts entered into during that fiscal year. Admin. Code § 67.24(e)(3). The list is a public record available for inspection and copying.

#### **5. Department head calendars**

The Mayor, City Attorney, and department heads must keep and maintain a daily calendar. Admin. Code § 67.29-5. The calendar must record the time and place of each meeting or event the official attended, excluding purely personal or social events at which no City business is discussed that did not take place at City offices or the offices or residences of people who do substantial business with the City or are substantially financially affected by City actions. For meetings not otherwise publicly recorded, the calendar must include a general statement of the issues discussed. The Sunshine Ordinance does not require the official to include on the calendar the names of individuals attending the meeting.

Calendars must be available to any requester three business days after the calendar entry date. Admin. Code § 67.29-5. The calendar entry date is not when the meeting or event was physically entered into the calendar, but rather is the date of the meeting or event. The official need not disclose calendars in advance of the calendar entry date.

#### **6. Maintaining a website**

Departments must maintain a publicly accessible website. Admin. Code § 67.29-2. Each department must post on its website the following information for all of its policy bodies (including but not limited to all boards and commissions, whether or not Charter-created, committees of policy bodies, and advisory bodies):

- Notices and agendas for meetings of policy bodies, posted no later than the time at which this information is otherwise distributed to the public, allowing reasonable time for posting.
- Minutes of meetings within 48 hours after they have been approved. This requirement does not impose a duty to keep minutes on policy bodies that are not required to keep minutes.
- All notices, agendas, and minutes of meetings of policy bodies for the previous three years. This requirement does not impose a duty to keep minutes on policy bodies that are not required to keep minutes.
- Information that the policy body or department is required to make publicly available.

Each department must make reasonable efforts to review its website regularly and update it at least weekly. Admin. Code § 67.29-2. The Sunshine Ordinance encourages departments to make available on their respective websites as much information and as many documents as possible concerning their activities. Admin. Code § 67.29-2.

In addition, the City must post on the City's website (or comparable accessible location on the internet) a current copy of the Charter and all City codes. Admin. Code § 67.29-2.

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### III. Records retention and destruction laws

Various local, state, and federal laws govern the retention and destruction of records. We summarize the most important requirements below. Department heads should familiarize themselves with the records retention requirements in Chapter 8 of the San Francisco Administrative Code and in the Sunshine Ordinance, as well as with rules relating to particular departmental records.

The purpose of the records classification and retention laws is to preserve important records for an appropriate period of time in an orderly fashion. Retention ensures that the public has access to important City records and that the legal and financial rights of the City and its residents are protected. In addition, a carefully considered retention policy obviates the need of a department to retain unnecessary records and incur unnecessary storage costs. Accordingly, each department must develop a written policy specifically outlining which records it must maintain, and for how long.

#### A. 'Records' defined

For the purpose of records retention law, the term "records" is defined much more narrowly than in the Public Records Act. In the retention context, "records" means any paper, book, photograph, film, sound recording, map, drawing, or other document, or any copy, made or received by the department in connection with the transaction of public business and retained by the department (1) as evidence of the department's activities, (2) for the information contained in it, or (3) to protect the legal or financial rights of the City or of persons directly affected by the activities of the City. Admin. Code § 8.1.

E-mail and other electronic records are potentially subject to the records retention laws. As with paper records, some electronic records fit the definition of "records" in the retention context. But most do not.

The vast majority of public records in the City's possession do not fall under the definition of "records" within the meaning of records retention law. Therefore, the City may destroy these records at any time. For example, as a general rule, employees may immediately dispose of phone message slips, notes of meetings, research notes prepared for the personal use of the employee creating them, and the large majority of e-mail communications.

In addition, departments may destroy at any time periodicals or publications they receive that are not of historical significance. They likewise may destroy duplicate copies even of documents the original copy of which the responsible City department must retain under records retention law. Govt. Code § 34090.7. With the exception of certain draft agreements, departments generally need not retain drafts of documents that later drafts or a final version supersede.

## B. Classification of records

All records that are subject to records retention requirements fall into three classifications – Current, Storage, and Permanent – as described below.

- **Current Records:** Records that the department retains in its office space and equipment for convenience, ready reference, or other reason.
- **Storage Records:** Records that the department need not retain in its office space and equipment but that the department must, or should, prudently preserve for a time or permanently in the facilities of a records center.
- **Permanent Records:** Records that the department must permanently retain.

Admin. Code § 8.4. The department head is responsible for determining which types of departmental records properly fall under each of these classifications. Admin. Code § 8.3.

Departments must also designate certain records as “Essential Records” – essential to the continuity of government and the protection of rights and interests of individuals in case of possible destruction by a major disaster, such as fire, earthquake, flood, enemy attack, or other cause. Admin. Code § 8.9.

## C. Retention and destruction of records

### 1. The records retention schedule

State law sets a floor for records retention. The general rule is that departments must maintain all records subject to records retention requirements for at least two years. Govt. Code § 34090. Again we emphasize that this requirement applies only to the minority of records in the possession of most City departments that are subject to any retention requirements. There are certain exceptions to the two-year State law standard, requiring records to be maintained for a longer period or permitting their destruction in a shorter period.

Consistent with State law, City law sets the following schedule for how long records must be retained.

**Current records and storage records—more than two but less than five years old.** Departments may destroy or otherwise dispose of these records if (1) their destruction will not be detrimental to the City or defeat any public purpose, and (2) a records retention schedule includes a definitive description of such records and sets forth the retention period applicable to them. The department head must prepare the schedule. The Mayor or Mayor’s designee, or the board or commission that oversees the department, must approve the schedule. Further, the City Attorney must approve the schedule as to records of legal significance, the Controller must approve it as to financial records, and the Retirement Board must approve it as to time rolls, time cards, payroll checks, and related matters. Admin. Code § 8.3.

**Current records and storage records—over five years old.** Departments may destroy these records if they have served their purpose and are no longer required for any public

business or other public purpose. But departments may destroy financial records only after the Controller's approval; legally significant records only after the City Attorney's approval; and payroll checks, time cards, and related documents only after the Retirement Board's approval. Departments must deliver payroll checks, time cards, and related documents to the Retirement Board upon its request instead of destroying them. Admin. Code § 8.3.

**Permanent records and essential records.** Departments may not destroy or otherwise dispose of these records, except as stated here. Admin. Code § 8.3. Unless otherwise required by law or regulation, the City must store permanent records by microfilming the paper records or placing them on an optical imaging storage system, placing the original film or tape in a State-approved storage vault, and maintaining a copy with the department. Admin. Code § 8.4. The department, at its discretion, may then destroy the paper records.

## **2. Other principles pertaining to retention of records**

Even if a document does not meet the definition of "record" for retention purposes, if the department receives a public records request for the document, it may not destroy it. The legal obligation to respond to public records requests and provide responsive records unless there is a legal basis for withholding them precludes the department from destroying the document after receiving the request.

The same principles apply if a document meets the definition of "record" for retention purposes but due to the passage of time could have been destroyed under the applicable records retention schedule. If the document is in the department's possession at the time of the public records request, the legal obligation to respond to the public records request trumps the discretion the department otherwise would have to destroy the document.

If a department elects to or must retain a particular e-mail, it must create and retain a hard copy in the appropriate file. In the alternative, a department with a reliable computer data storage and retrieval system may elect to store the document on that system. Departments may not rely on e-mail back up tapes to comply with City and State record retention laws.

## **D. Sunshine Ordinance provisions**

The Sunshine Ordinance addresses certain records retention issues, as discussed below.

### **1. The general duty to maintain and preserve records**

The Mayor and all department heads must maintain and preserve all documents and correspondence in a professional and businesslike manner. Admin. Code § 67.29-7(a). This does not mean that a department must retain all its records. Rather, institution of and compliance with the department's records retention policy satisfies this provision.

## **2. Designation of certain officials' records as city property that remains with the city**

Documents that the Mayor's Office, elected officials, or department heads prepare, receive, or maintain are the City's property. The City must maintain the originals of such records consistent with record retention policies, even after the official leaves the office. Admin. Code § 67.29-1.

## **3. Duty to cooperate with City Administrator in compiling city index**

The Sunshine Ordinance requires the City Administrator to compile an index that identifies the types of information and documents the City's departments, agencies, boards, commissions, and elected officials maintain. The index is for the use of City officials, staff, and the public. It should be organized to permit a general understanding of the types of information the City maintains, by which officials and departments, for which purposes, for what periods of retention, and under what manner of organization for accessing.

The City Administrator must continuously and accurately maintain the index. Each department, commission, and public official must cooperate with the City Administrator to identify the types of records it maintains, including those documents created by the entity, those documents it receives in the ordinary course of business, and the types of requests that it regularly receives. Each department, agency, commission, or public official shall report any changes in practices or procedures affecting the accuracy of the index. Admin. Code § 67.29.

## **4. Specific retention requirements**

The Sunshine Ordinance requires retention of certain specific records. For example:

- Departments must retain for public review, before approval by a policy body, drafts of agreements City representatives are negotiating with another party that have been exchanged with that party. Admin. Code § 67.24(a)(2).
- Policy bodies must permanently retain tapes of their meetings, regardless of whether the body was required to tape the meeting. Admin. Code §§ 67.14(b), 67.8-1(a).
- The Department of Elections must preserve all records and invoices relating to the design and printing of ballots and other election materials, as well as records documenting who had custody of ballots from the time ballots are cast until they are received and certified by the department. Admin. Code § 67.29-7(b).
- Charter boards and commissions must retain for at least 30 days written materials that must be included in the public review file. Admin. Code § 67.23.

Some of these retention requirements are discussed in greater detail elsewhere in this Guide.



COUNTY OF LOS ANGELES, Plaintiff and Appellant, v. LOS ANGELES  
COUNTY EMPLOYEE RELATIONS COMMISSION, Defendant and Respondent;  
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Real Party in  
Interest and Respondent.

S191944

SUPREME COURT OF CALIFORNIA

56 Cal. 4th 905; 301 P.3d 1102; 157 Cal. Rptr. 3d 481; 2013 Cal. LEXIS 4692; 195  
L.R.R.M. 2933; 163 Lab. Cas. (CCH) P61,357

May 30, 2013, Filed

**SUBSEQUENT HISTORY:** Reported at *County of Los Angeles v. Los Angeles County Employees Relations Com.*, 2013 Cal. LEXIS 5959 (Cal., May 30, 2013)

**PRIOR HISTORY:**

Superior Court of Los Angeles County, No. BS116993, James C. Chalfant, Judge. Court of Appeal, Second Appellate District, Division Three, No. B217668.  
*County of Los Angeles v. Los Angeles County Employee Relations Com.*, 192 Cal. App. 4th 1409, 122 Cal. Rptr. 3d 464, 2011 Cal. App. LEXIS 209 (Cal. App. 2d Dist., 2011)

LexisNexis(R) Headnotes

Governments > Legislation > Interpretation

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Jurisdiction

[HN1] In giving the Public Employment Relations Board (PERB) jurisdiction over disputes arising under the Meyers-Milias-Brown Act (MMBA), *Gov. Code, § 3500 et seq.*, the Legislature made an express exception for the Los Angeles County Employee Relations Commission (ERCOM). *Gov. Code, § 3509, subd. (d)*, states that,

notwithstanding PERB's jurisdiction to administer the MMBA, ERCOM retains the power to consider and resolve employment relations matters consistent with and pursuant to the policies of this chapter. Allegations of unfair labor practices by Los Angeles County must be brought to ERCOM, not PERB. In essence, ERCOM is a separate agency empowered to resolve public employment labor disputes in Los Angeles County just as PERB does for all other counties in California. ERCOM must exercise its authority in a manner consistent with and pursuant to the policies of the MMBA as interpreted and administered by PERB. Accordingly, the county's ordinance must be construed to avoid any conflict with the MMBA, and decisions from PERB interpreting the MMBA are highly persuasive when interpreting the county's ordinance. Federal administrative decisions interpreting analogous provisions of the National Labor Relations Act are also persuasive authority.

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

[HN2] Decisions under the National Labor Relations Act and corresponding California laws have long held that employers must generally give unions the home addresses and telephone numbers of employees the union represents. These holdings stem from the general principle that an employer's duty to bargain in good faith

encompasses an obligation to provide information the union needs in order to represent employees. The United States Supreme Court has observed that there can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. Some information is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant. Presumptively relevant information must be disclosed unless the employer proves a lack of relevance or gives adequate reasons why the information cannot be supplied. Moreover, in appropriate cases, a union's ability to obtain relevant information may be tempered by measures to accommodate privacy concerns. Upon a clear showing of need for confidentiality, courts have found less than complete disclosure justified.

*Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain*

*Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation*

[HN3] A union elected as an exclusive bargaining agent owes a duty of fair representation to all employees in the bargaining unit. Accordingly, state and federal decisions have consistently held that the employer's obligation to provide relevant information extends to information about employees who are not union members. The National Labor Relations Board has held that employees' home addresses and phone numbers are presumptively relevant to the union's role as bargaining agent.

*Constitutional Law > Substantive Due Process > Privacy > Personal Information*

*Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain*

*Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation*

[HN4] Public Employment Relations Board (PERB) decisions have held that employee contact information is presumptively relevant under California's labor statutes and subject to disclosure upon a representative union's request. When such a request threatens to violate a constitutionally protected privacy interest, PERB decisions have followed the National Labor Relations Board in applying a balancing test. Once the union has established the relevance and need for certain information, the burden is on the employer to prove that disclosure would compromise the right of privacy. If the

employer carries this burden, the court balances the conflicting interests of confidentiality and discovery. However, if the employer fails to show that disclosure would violate a protected privacy interest, no balancing is necessary and the court will simply order the information disclosed. A union is entitled to obtain all information necessary and relevant to representing employees in collective bargaining.

*Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain*

[HN5] *Gov. Code, § 3505*, requires public employers to meet and confer in good faith with union representatives regarding wages, hours, and other terms and conditions of employment. The statute states that the duty to meet and confer includes a duty to negotiate to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation.

*Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain*

*Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Refusals to Bargain*

[HN6] The meet and confer duty requires parties to exchange freely information and to endeavor to reach agreement on matters within the scope of representation. *Gov. Code, § 3505*. The phrase "matters within the scope of representation" describes the subjects on which the parties must seek agreement. It does not modify, or limit, the information that must be freely exchanged. One aspect of the duty to bargain collectively in good faith with labor organizations requires the employer to make a reasonable and diligent effort to comply with the union's request for relevant information. Doing so serves the underlying policy of the Meyers-Milias-Brown Act, *Gov. Code, § 3500 et seq.*, of fostering informed collective bargaining. Accordingly, appellate courts have held that an employer's failure to provide such information constitutes a refusal to bargain in good faith.

*Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview*

[HN7] *Gov. Code, § 3507*, lists several subjects on which a public employer may adopt rules to govern employment relations. Among these topics, the statute allows employers to adopt a rule for furnishing nonconfidential

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157 Cal. Rptr. 3d 481, \*\*\*; 2013 Cal. LEXIS 4692

information pertaining to employment relations to employee organizations. § 3507, *subd.* (a)(8).

*Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain*  
*Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize*

[HN8] *Gov. Code*, § 3507, is not the source of the duty to disclose. Rather, a public employer's disclosure obligation arises from *Gov. Code*, § 3503, concerning unions' right to represent employees, and *Gov. Code*, § 3505, concerning employers' obligation to bargain in good faith.

*Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain*

[HN9] See L.A. County Code, § 5.04.060, *subd.* A.

*Governments > State & Territorial Governments > Relations With Governments*

*Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview*

[HN10] Local rules cannot conflict with the Meyers-Milias-Brown Act (MMBA), *Gov. Code*, § 3500 *et seq.* The MMBA deals with a matter of statewide concern, and its standards may not be undercut by contradictory rules or procedures that would frustrate its purposes. Local regulation is permitted only if consistent with the purposes of the MMBA.

*Constitutional Law > Substantive Due Process > Privacy > General Overview*

[HN11] See *Cal. Const.*, art. I, § 1.

*Constitutional Law > Substantive Due Process > Privacy > General Overview*

*Torts > Intentional Torts > Invasion of Privacy > General Overview*

[HN12] An actionable constitutional invasion of privacy claim requires three essential elements: (1) the claimant must possess a legally protected privacy interest; (2) the claimant's expectation of privacy must be objectively reasonable; and (3) the invasion of privacy complained of must be serious in both its nature and scope. If the claimant establishes all three required elements, the strength of that privacy interest is balanced against countervailing interests. In general, a court should not

proceed to balancing unless a satisfactory threshold showing is made. A defendant is entitled to prevail if it negates any of the three required elements. A defendant can also prevail at the balancing stage. An otherwise actionable invasion of privacy may be legally justified if it substantively furthers one or more legitimate competing interests. Conversely, the invasion may be unjustified if the claimant can point to feasible and effective alternatives with a lesser impact on privacy interests.

*Constitutional Law > Substantive Due Process > Privacy > General Overview*

*Torts > Intentional Torts > Invasion of Privacy > General Overview*

[HN13] In applying the balancing test for a constitutional invasion of privacy claim, trial courts necessarily have broad discretion to weigh and balance the competing interests.

*Constitutional Law > Substantive Due Process > Privacy > Personal Information*

[HN14] Legally recognized privacy interests include interests in precluding the dissemination or misuse of sensitive and confidential information, which have been described under the umbrella term "informational privacy." Individuals have a substantial interest in the privacy of their home. In particular, the privacy interest in avoiding unwanted communication is stronger in the context of an individual's home than in a more public setting. Accordingly, home contact information is generally considered private.

*Constitutional Law > Substantive Due Process > Privacy > General Overview*

[HN15] A reasonable expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. The reasonableness of a privacy expectation depends on the surrounding context. Customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.

*Constitutional Law > Substantive Due Process > Privacy > Personal Information*

[HN16] A job applicant who provides personal information to a prospective employer can reasonably

expect that the employer will not divulge the information outside the entity except in very limited circumstances. For example, various laws require employers to disclose information to governmental agencies, such as the Internal Revenue Service and Social Security Administration, and disclosure may also be necessary for banks or insurance companies to provide employee benefits. But beyond these required disclosures, it is reasonable for employees to expect that their home contact information will remain private in light of employers' usual confidentiality customs and practices.

*Constitutional Law > Substantive Due Process > Privacy > General Overview*  
*Torts > Intentional Torts > Invasion of Privacy > General Overview*

[HN17] Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.

*Constitutional Law > Substantive Due Process > Privacy > General Overview*

[HN18] Invasion of a privacy interest is not a violation of California's state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.

*Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation*  
*Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Breach of Duty of Fair Representation*

[HN19] A union breaches the duty of representation if it fails to inform employees about the status of negotiations or changes in the contractual terms of their employment. Because the union's duty extends to all employees in the bargaining unit, regardless of union membership, the union must have the means of communicating with all employees on these important topics. In addition, a union must give nonmembers an opportunity to express their views on bargaining matters, even if these employees do

not have a vote. Direct communication between unions and all bargaining unit employees is essential to ensure that nonmembers' opinions are heard. Finally, every year the union must send Hudson notices to all employees explaining how their dues are used. The obligation to send Hudson notices falls on the union, not the employer, and a union commits an unfair business practice if it collects an agency fee without providing a proper notice.

*Administrative Law > Judicial Review > Remedies > General Overview*

[HN20] *Code Civ. Proc.*, § 1094.5, subd. (f), expressly limits the remedies a court may order when reviewing administrative orders and decisions. The court can deny the writ or grant it and set aside the decision. If it sets aside the decision, the court can order the agency to take further action, but it cannot limit or control in any way the discretion legally vested in the agency.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

The trial court denied a county's petition for administrative mandate challenging a hearing officer's order that the county disclose nonmember employees' contact information to a union. The union requested contact information for employees in bargaining units covered by agency shop provisions. The county objected that disclosure of contact information would violate nonmembers' privacy rights. (Superior Court of Los Angeles County, No. BS116993, James C. Chalfant, Judge.) The Court of Appeal, Second Dist., Div. Three, No. B217668, ruled that the union could obtain contact information only for nonmember employees who failed to object.

The Supreme Court reversed the decision of the Court of Appeal and remanded for entry of judgment denying the county's petition for writ of mandate. The court held that the contact information was presumptively relevant to the union's duty of fair representation; thus, the county's duty to bargain in good faith (*Gov. Code*, § 3505) encompassed an obligation to provide the information. The county's disclosure obligation, which also arose in part from *Gov. Code*, § 3503, was not limited by *Gov. Code*, § 3507, subd. (a)(8). Although nonmember employees had a privacy interest (*Cal. Const.*, art. I, § 1) in maintaining the privacy of their home addresses and telephone numbers, a balancing of

interests favored disclosure of the information because direct communication between the union and the employees was essential to keep the employees informed and to ensure that their opinions were heard. The court of appeal overstepped its authority (*Code Civ. Proc.*, § 1094.5, *subd. (f)*) by ordering specific notice and opt-out procedures, which interfered with agency discretion. (Opinion by Corrigan, J., expressing the unanimous view of the court.) [\*906]

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Labor § 37--Collective Bargaining--Jurisdiction--Meyers-Milias-Brown Act--Los Angeles County Employee Relations Commission.--In giving the Public Employment Relations Board (PERB) jurisdiction over disputes arising under the Meyers-Milias-Brown Act (MMBA) (*Gov. Code*, § 3500 *et seq.*), the Legislature made an express exception for the Los Angeles County Employee Relations Commission (ERCOM). *Gov. Code*, § 3509, *subd. (d)*, states that, notwithstanding PERB's jurisdiction to administer the MMBA, ERCOM retains the power to consider and resolve employment relations matters consistent with and pursuant to the policies of this chapter. Allegations of unfair labor practices by Los Angeles County must be brought to ERCOM, not PERB. In essence, ERCOM is a separate agency empowered to resolve public employment labor disputes in Los Angeles County just as PERB does for all other counties in California. ERCOM must exercise its authority in a manner consistent with and pursuant to the policies of the MMBA as interpreted and administered by PERB. Accordingly, the county's ordinance must be construed to avoid any conflict with the MMBA, and decisions from PERB interpreting the MMBA are highly persuasive when interpreting the county's ordinance. Federal administrative decisions interpreting analogous provisions of the National Labor Relations Act are also persuasive authority.

(2) Labor § 37--Collective Bargaining--Duty to Bargain--Disclosing Employee Contact Information to Union.--Decisions under the National Labor Relations Act and corresponding California laws have long held that employers must generally give unions the home addresses and telephone numbers of employees the union represents. These holdings stem from the general

principle that an employer's duty to bargain in good faith encompasses an obligation to provide information the union needs in order to represent employees. The United States Supreme Court has observed that there can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. Some information is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant. Presumptively relevant information must be disclosed unless the employer proves a lack of relevance or gives adequate reasons why the information cannot be supplied. Moreover, in appropriate cases, a union's ability to obtain relevant information may be tempered by measures to accommodate privacy concerns. Upon a clear showing of need for confidentiality, courts have found less than complete disclosure justified. [\*907]

(3) Labor § 37--Collective Bargaining--Duty of Fair Representation--Employee Contact Information Presumptively Relevant.--A union elected as an exclusive bargaining agent owes a duty of fair representation to all employees in the bargaining unit. Accordingly, state and federal decisions have consistently held that the employer's obligation to provide relevant information extends to information about employees who are not union members. The National Labor Relations Board has held that employees' home addresses and phone numbers are presumptively relevant to the union's role as bargaining agent.

(4) Labor § 37--Collective Bargaining--Duty of Fair Representation--Employee Contact Information Presumptively Relevant.--Public Employment Relations Board (PERB) decisions have held that employee contact information is presumptively relevant under California's labor statutes and subject to disclosure upon a representative union's request. When such a request threatens to violate a constitutionally protected privacy interest, PERB decisions have followed the National Labor Relations Board in applying a balancing test. Once the union has established the relevance and need for certain information, the burden is on the employer to prove that disclosure would compromise the right of privacy. If the employer carries this burden, the court balances the conflicting interests of confidentiality and discovery. However, if the employer fails to show that disclosure would violate a protected privacy interest, no balancing is necessary and the court will simply order the

information disclosed. A union is entitled to obtain all information necessary and relevant to representing employees in collective bargaining.

(5) **Labor § 37--Collective Bargaining--Duty to Bargain--Disclosing Employee Contact Information to Union.**--The meet and confer duty requires parties to exchange freely information and to endeavor to reach agreement on matters within the scope of representation (*Gov. Code, § 3505*). The phrase "matters within the scope of representation" describes the subjects on which the parties must seek agreement. It does not modify, or limit, the information that must be freely exchanged. One aspect of the duty to bargain collectively in good faith with labor organizations requires the employer to make a reasonable and diligent effort to comply with the union's request for relevant information. Doing so serves the underlying policy of the Meyers-Milias-Brown Act (*Gov. Code, § 3500 et seq.*) of fostering informed collective bargaining. Accordingly, appellate courts have held that an employer's failure to provide such information constitutes a refusal to bargain in good faith.

(6) **Labor § 37--Collective Bargaining--Duty to Bargain--Disclosing Employee Contact Information to Union.**--*Gov. Code, § 3507*, is not the [\*908] source of the duty to disclose. Rather, a public employer's disclosure obligation arises from *Gov. Code, § 3503*, concerning unions' right to represent employees, and *Gov. Code, § 3505*, concerning employers' obligation to bargain in good faith.

(7) **Labor § 37--Collective Bargaining--Meyers-Milias-Brown Act--State Preemption of Contradictory Local Regulation.**--Local rules cannot conflict with the Meyers-Milias-Brown Act (MMBA) (*Gov. Code, § 3500 et seq.*). The MMBA deals with a matter of statewide concern, and its standards may not be undercut by contradictory rules or procedures that would frustrate its purposes. Local regulation is permitted only if consistent with the purposes of the MMBA.

(8) **Privacy § 7--Actions--Constitutional Invasion of Privacy Claim--Elements and Balancing Test.**--An actionable constitutional invasion of privacy claim requires three essential elements: (1) the claimant must possess a legally protected privacy interest; (2) the claimant's expectation of privacy must be objectively reasonable; and (3) the invasion of privacy complained of must be serious in both its nature and scope. If the claimant establishes all three required elements, the

strength of that privacy interest is balanced against countervailing interests. In general, a court should not proceed to balancing unless a satisfactory threshold showing is made. A defendant is entitled to prevail if it negates any of the three required elements. A defendant can also prevail at the balancing stage. An otherwise actionable invasion of privacy may be legally justified if it substantively furthers one or more legitimate competing interests. Conversely, the invasion may be unjustified if the claimant can point to feasible and effective alternatives with a lesser impact on privacy interests.

(9) **Privacy § 7--Actions--Constitutional Invasion of Privacy Claim--Discretion in Applying Balancing Test.**--In applying the balancing test for a constitutional invasion of privacy claim, trial courts necessarily have broad discretion to weigh and balance the competing interests.

(10) **Privacy § 3--Nature and Extent of Right--Home Contact Information.**--Legally recognized privacy interests include interests in precluding the dissemination or misuse of sensitive and confidential information, which have been described under the umbrella term "informational privacy." Individuals have a substantial interest in the privacy of their home. In particular, the privacy interest in avoiding unwanted communication is stronger in the context of an individual's home than in a more public setting. Accordingly, home contact information is generally considered private. [\*909]

(11) **Privacy § 3--Nature and Extent of Right--Reasonableness of Expectation.**--A reasonable expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. The reasonableness of a privacy expectation depends on the surrounding context. Customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.

(12) **Privacy § 3--Nature and Extent of Right--Home Contact Information--Disclosure by Employer.**--A job applicant who provides personal information to a prospective employer can reasonably expect that the employer will not divulge the information outside the entity except in very limited circumstances. For example, various laws require employers to disclose information to governmental agencies, such as the Internal Revenue Service and Social Security Administration, and

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disclosure may also be necessary for banks or insurance companies to provide employee benefits. But beyond these required disclosures, it is reasonable for employees to expect that their home contact information will remain private in light of employers' usual confidentiality customs and practices.

(13) Privacy § 7--Actions--Constitutional Invasion of Privacy Claim--Seriousness of Invasion.--Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.

(14) Privacy § 7--Actions--Constitutional Invasion of Privacy Claim--Application of Balancing Test.--Invasion of a privacy interest is not a violation of California's state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.

(15) Labor § 37--Collective Bargaining--Duty of Fair Representation--Breached by Failure to Inform--Necessity for Direct Communication.--A union breaches the duty of representation if it fails to inform employees about the status of negotiations or changes in the contractual terms of their employment. Because the union's duty extends to all employees in the bargaining unit, regardless of union membership, the union must have the means of communicating with all employees on [\*910] these important topics. In addition, a union must give nonmembers an opportunity to express their views on bargaining matters, even if these employees do not have a vote. Direct communication between unions and all bargaining unit employees is essential to ensure that nonmembers' opinions are heard. Finally, every year the union must send *Hudson* notices to all employees explaining how their dues are used. The obligation to send *Hudson* notices falls on the union, not the employer, and a union commits an unfair business practice if it collects an agency fee without providing a proper notice.

(16) Administrative Law § 99--Judicial Review and Relief--Methods--Administrative Mandamus--

Remedies Limited.--*Code Civ. Proc.*, § 1094.5, subd. (f), expressly limits the remedies a court may order when reviewing administrative orders and decisions. The court can deny the writ or grant it and set aside the decision. If it sets aside the decision, the court can order the agency to take further action, but it cannot limit or control in any way the discretion legally vested in the agency.

(17) Labor § 37--Collective Bargaining--Duty of Fair Representation--Necessity for Direct Communication--Outweighing Privacy Interest in Contact Information.--Long-standing case law and public policy support direct communication between unions and the employees they represent. Thus, a union's interest in communicating with all county employees significantly outweighed nonmembers' interest in preserving the privacy of their contact information.

[Wilcox, Cal. Employment Law (2013) ch. 51, § 51.30; *Cal. Forms of Pleading and Practice* (2013) ch. 429, *Privacy*, § 429.16.]

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JUDGES: Opinion by Corrigan, J., expressing the unanimous view of the court.

OPINION BY: Corrigan

## OPINION

[\*\*1105] [\*\*\*485] CORRIGAN, J.--This case involves the balance between an employee's right of informational privacy<sup>1</sup> and a union's right to obtain information it needs to represent the employee in collective bargaining. The Service Employees International Union, Local 721 (SEIU), is the exclusive bargaining representative of all Los Angeles County (County) employees. The question here is whether SEIU is entitled to obtain the home addresses and phone numbers of all represented employees, including those who have not joined the union. We agree with both courts below that it is so entitled but reverse the Court of Appeal's imposition of procedural requirements limiting disclosure.

<sup>1</sup> See *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 372-373 [53 Cal. Rptr. 3d 513, 150 P.3d 198] (*Pioneer Electronics*).

State and federal labor decisions have long held that unions are presumptively entitled to contact information for all employees they represent. These decisions, and applicable labor laws, generally obligate the County to give SEIU the requested information. Whether the right

to privacy under article I, [\*912] section 1 of the California Constitution prohibits disclosure is a question of first impression. We conclude that, although the County's employees have a cognizable privacy interest in their home addresses and telephone numbers, the balance of interests strongly favors disclosure of this information to the union that represents them. Procedures may be developed for employees who object to this disclosure. However, the Court of Appeal exceeded its authority in this administrative mandate proceeding by attempting to impose specific procedures on the parties.

## I. BACKGROUND

SEIU is the certified majority representative for County employees in several bargaining units. County employees have a collective right to unionize but an individual right to refuse to join or participate in a union. (*Gov. Code*, § 3502; <sup>2</sup> L.A. County Code, § 5.04.070.) To accommodate these rights, a public agency may enter into an "agency shop agreement" with the organization recognized as the employees' exclusive or majority bargaining agent. (§ 3502.5, *subd. (a)*.) An "agency shop" is "an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a service fee ..." (*Ibid.*)

2 All statutory references are to the Government Code unless otherwise specified.

Each of the County's bargaining units has a memorandum of understanding (MOU) with SEIU. Most of these MOUs have an agency shop provision that gives County employees four options: (1) join SEIU and pay dues; (2) decline to join and pay a fair share [\*\*1106] fee; (3) decline to join, object to the fair share fee, and instead pay an agency shop fee; or (4) decline to join, claim a religious exemption, and pay the agency shop fee to a nonreligious, nonlabor charitable fund. A recognized bargaining agent acts on behalf of all employees in a bargaining unit, whether the employees are union members or not.

*Teachers v. Hudson* (1986) 475 U.S. 292 [89 L. Ed. 2d 232, 106 S. Ct. 1066] (*Hudson*) requires that SEIU send County employees an annual notice to collect fees from nonmembers. The *Hudson* notice sets out membership options, applicable fees, and the reasons for these fees.<sup>3</sup> SEIU's notice [\*913] [\*\*\*486] packet also includes forms allowing the employee to join or decline

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to join the union. Those who decline are asked to provide their names, home addresses, and home telephone numbers. Employees who do not return any form are, by default, considered "fair share fee payers." As of 2007, nearly 12,000 of the County's approximately 14,500 nonmember employees were fair share fee payers. SEIU has home addresses for about half of these nonmembers.

4

3 In *Hudson*, the United States Supreme Court held that the *First Amendment* rights of nonunion employees require that, before an agency fee is collected, employees must receive "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (*Hudson*, *supra*, 475 U.S. at p. 310; see *Knax v. Service Employees* (2012) 567 U.S. \_\_\_, \_\_\_ [183 L. Ed. 2d 281, 132 S. Ct. 2277, 2292-2293] [*Hudson* notice must also be provided when public sector union imposes a special assessment or dues increase].)

4 SEIU also has contact information for approximately 46,000 County employees who are members.

Historically, the County provided lists of nonmembers' names, worksites, office addresses, and supervisors, but has never given SEIU home addresses or telephone numbers. Consequently, SEIU has not sent *Hudson* notices directly to County employees. Instead, since at least 1994, SEIU has delivered *Hudson* notice packets to the Los Angeles County Employee Relations Commission (ERCOM), an independent body that manages relations between the County and its employees under the Meyers-Milias-Brown Act (MMBA). (§§ 3507, 3509.)<sup>5</sup> ERCOM would then mail the *Hudson* notices, using address labels provided by the County.

5 ERCOM performs the same function for Los Angeles County as the Public Employment Relations Board performs for other public employers in California. (See *post*, at p. \_\_\_.)

During negotiations in 2006, SEIU proposed amending the MOU as follows: "To facilitate the carrying out of this responsibility [to provide *Hudson* notices], each year the County shall furnish the Union with the names and home addresses of employees in [the]

bargaining units covered by agency shop provisions." SEIU also sought contact information for other reasons. As the exclusive bargaining representative, SEIU wanted to communicate with all County employees, members or otherwise, about union activities and events.<sup>6</sup> It also wanted the information for recruitment<sup>7</sup> and investigation of grievances.

6 Some communication with nonmembers is possible through bulletin boards at County worksites.

7 A union representative testified: "If we had the chance to talk to [the nonmembers], we could have them as members."

The County rejected the amendment, contending contact information was not relevant to any collective bargaining issue and disclosure would violate nonmembers' privacy rights. The County proposed either to continue the current arrangement or to negotiate a procedure for employees to release their own data. SEIU opposed these alternatives, withdrew its proposal to modify the *Hudson* notice provision, and filed a charge with ERCOM alleging an unfair employee relations practice. [\*914]

After a three-day hearing, an administrative hearing officer concluded the County's refusal to provide the contact information was an unfair labor practice. Relying on decisions by the Public Employment Relations Board (PERB) and the National Labor Relations Board (NLRB), the hearing officer [\*1107] held the contact information was presumptively relevant (see *post*, at p. \_\_\_) to SEIU's representation. While acknowledging [\*\*\*487] that privacy interests were at stake, the hearing officer found the County had not met its burden to show that the nonmembers' privacy interest outweighed SEIU's need for the information. ERCOM adopted the hearing officer's findings and ordered disclosure.

The County sought a writ of administrative mandate, urging that nonmembers had a constitutional privacy right that justified nondisclosure.<sup>8</sup> (*Code Civ. Proc.*, § 1094.5.) Although the superior court concluded nonmember County employees had a legally protected privacy right and disclosure of their contact information constituted a "non-trivial" invasion of that right, it also held that SEIU needed the information to fulfill its duty to represent all County employees in collective bargaining. The court then balanced those competing interests. It observed that labor law precedents, while not

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dispositive, establish a strong public policy in favor of union access to the information. On balance, the public policy favoring collective bargaining outweighed any privacy interest nonmember County employees might have in nondisclosure. Because disclosure did not violate California law, the court denied the County's petition for relief from ERLC's order.

8 The trial court held the privacy claim had not been exhausted because the County had not relied on it at the administrative hearing. Nevertheless, the court considered the claim on its merits.

The County sought review, and the appellate court reversed the issue. It agreed with the trial court that nonmember employees had a reasonable expectation of privacy in their home addresses and phone numbers. However, the court did not balance this expectation of privacy against SEIU's need for the information. Instead, it characterized the question as whether a nonunion employee "has a reasonable expectation under California privacy laws that he or she will be provided notice and an opportunity to object before" contact information is disclosed to the union.

The court acknowledged the question it framed was one of first impression. It sought guidance by analogizing SEIU's request to a class action discovery request for consumers' personal information. Importing a procedure from class action litigation, the court held nonmember employees were entitled to notice and an opportunity to opt out before their home addresses and telephone numbers could be disclosed to SEIU. (See, e.g., *Pioneer Electronics*, *supra*, 40 Cal.4th at pp. 372-373.) In this analysis, the appellate court [\*915] assumed the privacy rights of objecting employees would always outweigh SEIU's need for the information and that SEIU only had a right to contact information for those nonmember employees who failed to object. We granted SEIU's petition for review.

## II. DISCUSSION

### A. Employer's Duty to Provide Information Relevant to Collective Bargaining

As a threshold matter, apart from privacy concerns, the County contends no applicable law requires that it give SEIU the requested information. We hold to the contrary. Under the MMBA and applicable labor law precedents, the failure to provide relevant information

violated the County's obligation to bargain in good faith. Before turning to the good faith question, we explore the interrelation between federal and state labor laws.

### [\*\*\*488] 1. Overview of Applicable Labor Laws

The *National Labor Relations Act* (NLRA; 29 U.S.C. § 151 et seq.) governs collective bargaining in private sector employment. (1 Castagnera et al., *Termination of Employment* (2002) § 1:131; see *Department of Defense v. FLRA* (1994) 510 U.S. 487, 503 [127 L.Ed.2d 325, 114 S.Ct. 1006] (Dept. of Defense); *Teledyne Economic Development v. N.L.R.B.* (4th Cir. 1997) 108 F.3d 56, 59.) However, the NLRA leaves states free to regulate labor relationships with their public employees. (29 U.S.C. § 152(2); *Davenport v. Washington Ed. Assn.* (2007) 551 U.S. 177, 181 [168 L.Ed.2d 71, 127 S.Ct. 2372].)

[\*\*1108] Public employees in California do not have the right to bargain collectively absent enabling legislation. (*American Federation of State etc. Employees v. County of Los Angeles* (1975) 49 Cal. App. 3d 356, 358 [122 Cal. Rptr. 591] (*American Federation*).) Rather than fashion a single overarching employment relations law, like the NLRA, our Legislature has passed several different statutes covering specific categories of public employees. (See *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1084-1086 [29 Cal. Rptr. 3d 234, 112 P.3d 623] (*Coachella Valley*).) In 1968, the Legislature enacted the MMBA, authorizing collective bargaining for employees of most local governments, including Los Angeles County. (§ 3500 et seq., amended by Stats. 1968, ch. 1390, pp. 2725-2729.) State employees and those of school districts were excluded from the MMBA (*Coachella Valley*, at p. 1083), but separate statutes were later enacted to cover these government [\*916] workers.<sup>9</sup> "The MMBA imposes on local public entities a duty to meet and confer in good faith with representatives of recognized employee organizations, in order to reach binding agreements governing wages, hours, and working conditions of the agencies' employees. (Gov. Code, § 3505)." (*Coachella Valley*, at p. 1083.)

9 Employment relations between the State of California and certain categories of its employees are governed by the Ralph C. Dills Act. (§ 3512 et seq., amended by Stats. 1986, ch. 103, § 1, p. 237.) School district employment relations are

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covered by the Educational Employment  
Relations Act. (§ 3540 *et seq.*)

The MMBA is administered by PERB, a quasi-judicial administrative agency modeled after the NLRB. (See *Coachella Valley*, *supra*, 35 Cal.4th at pp. 1084-1085; § 3540.) Although the Legislature initially created PERB in 1975 to enforce a different employment relations statute,<sup>10</sup> PERB's jurisdiction has expanded as the Legislature passed new laws addressing specific realms of public employment. (*Coachella Valley*, at p. 1085.) In 2000, the Legislature brought the MMBA within PERB's authority (*Coachella Valley*, at p. 1085; Stats. 2000, ch. 901, § 8, p. 6607 [adding § 3509]), giving PERB exclusive initial jurisdiction over complaints alleging unfair labor practices violating the MMBA. (§ 3509; *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 605 [\*\*\*489]) (110 Cal. Rptr. 3d 718, 232 P.3d 701.) However, the statute does not apply to Los Angeles County. (§ 3509, *subd.* (d).)

10 The Legislature created the Educational Employment Relations Board (EERB) in 1975 to administer the *Educational Employment Relations Act* (EERA). (*Coachella Valley*, *supra*, 35 Cal.4th at pp. 1084-1085.) In 1977 the Legislature expanded the EERB's jurisdiction to encompass unfair practice charges under the former State Employer-Employee Relations Act (§ 3512 *et seq.* [now the Ralph C. Dills Act]) and renamed the entity "Public Employment Relations Board." (*Coachella Valley*, at p. 1085.)

(1) In the same year the MMBA was enacted, the County passed its own ordinance conforming to the legislative policies expressed in the MMBA. (*American Federation*, *supra*, 49 Cal. App. 3d at p. 358.) The ordinance created ERCOM to administer its provisions. (*Ibid.*; *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal. App. 3d 1, 3 [108 Cal. Rptr. 625].) [HN1] In giving PERB jurisdiction over MMBA disputes, the Legislature made an express exception for ERCOM. *Section 3509, subdivision (d)* states that, notwithstanding PERB's jurisdiction to administer the MMBA, ERCOM retains the power to consider and resolve employment relations matters "consistent with and pursuant to the policies of this chapter." Allegations of unfair labor practices by the County must be brought to ERCOM, not PERB. In

essence, ERCOM is a separate agency empowered to resolve public employment labor disputes in Los Angeles County just as PERB does for all other counties in California. [\*917]

ERCOM must exercise its authority in a manner "consistent with and pursuant to" the policies of the MMBA as interpreted and administered by PERB. (§ 3509, *subd.* (d).) Accordingly, the County's ordinance must be construed to avoid any conflict with [\*1109] the MMBA, and decisions from PERB interpreting the MMBA are highly persuasive when interpreting the County's ordinance. As we discuss, PERB decisions have uniformly given unions the right to obtain employee home contact information. Federal administrative decisions interpreting analogous provisions of the NLRA are also persuasive authority supporting disclosure of the information sought here.

## 2. Labor Law Precedents Hold Contact Information Presumptively Relevant

[HN2] (2) Decisions under the NLRA and corresponding California laws have long held that employers must generally give unions the home addresses and telephone numbers of employees the union represents. These holdings stem from the general principle that an employer's duty to bargain in good faith encompasses an obligation to provide information the union needs in order to represent employees. The United States Supreme Court has observed, "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." (*NLRB v. Acme Industrial Co.* (1967) 385 U.S. 432, 435-436 [17 L. Ed. 2d 495, 87 S. Ct. 565], citing *Labor Board v. Truitt Mfg. Co.* (1956) 351 U.S. 149 [100 L. Ed. 1027, 76 S. Ct. 753].)

Some information is so intrinsic to the core of the employer-employee relationship that it is considered "presumptively relevant." (*Reitlaw Broadcasting Co. v. N.L.R.B.* (9th Cir. 1999) 172 F.3d 660, 669; see *San Diego Newspaper Guild, Local No. 95 v. NLRB* (9th Cir. 1977) 548 F.2d 863, 867 (*San Diego Newspaper Guild*).) Presumptively relevant information must be disclosed unless the employer proves a lack of relevance or gives adequate reasons why the information cannot be supplied. (*San Diego Newspaper Guild*, at p. 867; *The Kroger Company* (1976) 226 N.L.R.B. 512, 513-514.)<sup>11</sup> Moreover, in appropriate [\*\*\*490] cases, a union's

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ability to obtain relevant information may be tempered by measures to accommodate privacy concerns. "Upon a clear showing of need for confidentiality, courts have found less than complete disclosure justified. [Citations.]" (*Press Democrat*, *supra*, 629 F.2d at pp. 1326-1327; see *Detroit Edison Co. v. NLRB* (1979) 440 U.S. 301, 317-320 [59 L. Ed. 2d 333, 99 S. Ct. 1123].)

11 Conversely, when the information requested is not ordinarily pertinent to collective bargaining, the union has the burden of establishing relevance. (*Press Democrat Publishing Co. v. NLRB* (9th Cir. 1980) 629 F.2d 1320, 1324 (*Press Democrat*); *San Diego Newspaper Guild, supra*, 548 F.2d at pp. 867-868.)

[\*918]

[HN3] (3) A union elected as an exclusive bargaining agent owes a duty of fair representation to all employees in the bargaining unit. (See *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 283 [22 Cal. Rptr. 3d 706]; *Lane v. I.U.O.E. Stationary Engineers* (1989) 212 Cal. App. 3d 164, 169 [260 Cal. Rptr. 634]; see also *Vaca v. Sipes* (1967) 386 U.S. 171, 177 [17 L. Ed. 2d 842, 87 S. Ct. 903] [same rule under NLRA].) Accordingly, state and federal decisions have consistently held that the employer's obligation to provide relevant information extends to information about employees who are not union members.

#### a. NLRB Decisions

The NLRB has held that employees' home addresses and phone numbers are presumptively relevant to the union's role as bargaining agent. (*Harco Laboratories* (1984) 271 N.L.R.B. 1397, 1398.) An evolving line of cases establishing this point began in 1966, just two years before the MMBA was enacted. In *Excelsior Underwear, Inc.* (1966) 156 N.L.R.B. 1236, 1239-1240, the NLRB ruled that private employers must provide unions with the names and addresses of all employees before an election to choose a bargaining representative. The NLRB reasoned that an employer can easily communicate with employees to oppose union representation, but labor organizers generally have limited access to worksites. Thus, without a list of employee names and addresses, labor unions cannot be certain of reaching all employees with arguments supporting representation. (*Id.* at pp. 1240-1241.) Although the union might have other means of communicating with some employees, these alternatives are not always adequate. The NLRB stressed

[\*\*1110] that "the access of all employees to such communications can be insured only if all parties have the names and addresses of all the voters. ... [B]y providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation." (*Id.* at p. 1241, fn. omitted.) The United States Supreme Court later observed that the disclosure requirement established in *Excelsior Underwear* promotes the goal of fair elections "by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses." (*NLRB v. Wyman-Gordon Co.* (1969) 394 U.S. 759, 767 [22 L. Ed. 2d 709, 89 S. Ct. 1426].)

Nearly 30 years ago, this court applied the *Excelsior Underwear* rule in the agricultural context. In *Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654 [205 Cal. Rptr. 657, 685 P.2d 701], we upheld a regulation requiring employers to provide a list of employee names, street addresses, and job classifications to a union seeking to organize agricultural employees. We noted that employers had long been required to furnish unions with lists of employee names and addresses under *Excelsior Underwear* and that facilitating communication between employees and union organizers aided the administration [\*\*\*491] of union elections. (*Carian*, at pp. 665-667.) [\*919]

The *Excelsior Underwear* decision was later extended beyond the election context. In *Prudential Ins. Co. of America v. N.L.R.B.* (2d Cir. 1969) 412 F.2d 77, 81 (*Prudential*), the Second Circuit Court of Appeals held that an employer's duty of disclosure "applies with as much force to information needed by the Union for the effective administration of a collective bargaining agreement already in force as to information relevant in the negotiation of a new contract. [Citations.]" As the exclusive bargaining agent for all employees, a union has a statutory duty to represent the interests of nonmembers. (*Humphrey v. Moore* (1964) 375 U.S. 335, 342 [11 L. Ed. 2d 370, 84 S. Ct. 363].) The *Prudential* court remarked, "It seems manifest beyond dispute that the Union cannot discharge its obligation unless it is able to communicate with those in whose behalf [it] acts." (*Prudential*, at p. 84.) A union must be able to tell employees about negotiations and obtain their views on bargaining priorities. (*Ibid.*) "Further, in order to administer an existing agreement effectively, a union must be able to

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apprise the employees of the benefits to which they are entitled under the contract and of its readiness to enforce compliance with the agreement for their protection." (*Ibid.*)

The *Prudential* court observed that other types of information, such as wage data, are considered presumptively relevant. (*Prudential*, *supra*, 412 F.2d at p. 84.) It went on to conclude that employee contact information "has an even more fundamental relevance" to the union's role. (*Ibid.*) The union needs contact information "to bargain intelligently on specific issues of concern to the employees. But data without which a union cannot even communicate with employees whom it represents is, by its very nature, fundamental to the entire expanse of a union's relationship with the employees. In this instance it is urgent so that the exclusive bargaining representative of the employees may perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests. Because this information is therefore so basically related to the proper performance of the union's statutory duties, ... any special showing of specific relevance would be superfluous." (*Ibid.*)

#### b. PERB Decisions

(4) As noted, NLRA cases are persuasive authority for interpreting similar provisions of state law, including the MMBA. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 617 [116 Cal. Rptr. 507, 526 P.2d 971]; see *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 63-64 [151 Cal. Rptr. 547, 588 P.2d 249] [relying on NLRB precedent in construing MMBA provision regarding layoffs].) Based on *Prudential* and similar cases decided under the NLRA, [HN4] PERB decisions have held that employee contact information is presumptively relevant under California's labor [\*1111] statutes and subject to disclosure upon a representative union's request. [\*920]

When such a request threatens to violate a constitutionally protected privacy interest, PERB decisions have also followed the NLRB in applying a balancing test. (*Modesto City Schools & High School Dist.* (1985) PERB Dec. No. 479; *Los Rios Community College Dist.* (1988) PERB Dec. No. 670; see *Detroit Edison Co. v. NLRB*, *supra*, 440 U.S. at pp. 317-320 [establishing the federal balancing test].) Once the union has established the relevance and need for certain information, the burden is on the employer to prove that

disclosure would compromise the right of [\*\*\*492] privacy. (*Modesto City Schools*, at p. 10.) If the employer carries this burden, the court balances the conflicting interests of confidentiality and discovery. (*Id.* at pp. 11-13.) However, if the employer fails to show that disclosure would violate a protected privacy interest, no balancing is necessary and the court will simply order the information disclosed. (*Id.* at p. 12.)

In *Stockton Unified School Dist.* (1980) PERB Dec. No. 143 (*Stockton*), a school district refused to provide information about health insurance benefits paid to union members. Relying on NLRB cases, PERB ruled that a union is entitled to obtain all information necessary and relevant to representing employees in collective bargaining. (*Id.* at p. 22.) Because the health insurance information was presumptively relevant, the district's failure to provide it constituted a refusal to bargain in good faith under the EERA. (§ 3543.5; see *Stockton*, at pp. 18-19.)<sup>12</sup> Two years later, PERB extended *Stockton* to a request for employee addresses. In *Mt. San Antonio Community College Dist.* (1982) PERB Dec. No. 224 (*Mt. San Antonio*), a union sought home addresses of certain instructors who no longer worked for a community college district but were potentially entitled to benefits under a recent decision of this court. (*Id.* at p. 11.)<sup>13</sup> The hearing officer concluded that the requested names and addresses were reasonably related to the union's representational duties. (*Mt. San Antonio*, at p. 11.) PERB agreed and ordered disclosure. (*Id.* at p. 12.)

12 The EERA is one of several public employment statutes administered by PERB. (*Coachella Valley*, *supra*, 35 Cal.4th at p. 1089.) Like the MMBA (§ 3505), the EERA requires public school employers to "meet and negotiate in good faith" with their employees' exclusive bargaining representatives. (§ 3543.5, *subd. (c)*.)  
13 *Peralta Federation of Teachers v. Peralta Community College Dist.* (1979) 24 Cal.3d 369 [155 Cal. Rptr. 679, 595 P.2d 113].

After *Mt. San Antonio*, PERB decisions have squarely held that the names and addresses of public employees are presumptively relevant and subject to disclosure as part of the duty to bargain in good faith. In *Bakersfield City School Dist.* (1998) PERB Dec. No. 1262 (*Bakersfield*), a union representing school district employees wanted their home addresses and telephone numbers to send *Hudson* notices and communicate with

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nonmembers about other collective bargaining issues. Alternate means of communication were not consistently reliable or confidential. (*Bakersfield*, at p. 15 [hearing officer's [\*921] proposed order].) <sup>14</sup> Citing *Mt. San Antonio* and NLRB decisions, PERB concluded the employee contact information was presumptively relevant to collective bargaining and the district's failure to provide it violated the EERA, both as a refusal to bargain in good faith (§ 3543.5, subd. (c)) and as an interference with the union's right to represent unit members (§ 3543.5, subd. (b)). (*Bakersfield*, at p. 22; see *San Bernardino City Unified School Dist.* (1998) PERB Dec. No. 1270 at pp. 75-79.)

14 PERB adopted the hearing officer's findings of fact and conclusions of law as the decision of the board itself. (*Bakersfield*, *supra*, PERB Dec. No. 1262 at p. 2.)

These principles also apply to claims arising under the MMBA. In *Golden Empire Transit Dist.* (2004) PERB Dec. No. 1704-M (*Golden Empire*), a bus drivers' union requested employees' home addresses and phone numbers. The transit district refused, citing confidentiality concerns. (*Id.* at p. 2.) Instead, the district sent a consent form to all employees allowing them to agree to disclosure. Contact information would only be released to the [\*\*\*493] union if the employee gave express permission. (*Id.* at pp. 2-3.) PERB [\*\*1112] concluded the district violated the MMBA (§§ 3503, 3505, 3506) by refusing to give the information "and by unilaterally changing the mechanics of providing such information" to the union. (*Golden Empire*, at p. 9.) Because a union's ability to communicate with those it represents is fundamental to its role in collective bargaining, employee contact information must be disclosed absent a compelling need for privacy. (*Golden Empire*, at p. 8.) The union's need for the information was strong. Its inability to communicate with employees in their homes had "severely hindered" the capacity to fulfill its obligations as their bargaining representative. (*Id.* at p. 7.) For example, the union could not advise employees of new union security requirements, dues increases, and workplace problems. (*Ibid.*) With home address and telephone information, the union could directly inform employees about union meetings and negotiations and quickly contact employees who were potential witnesses in grievance investigations. (*Ibid.*) The union could not adequately communicate through alternate means, such as bulletin board postings or personal meetings at the

jobsite, because the employees were bus drivers who worked different shifts and were frequently on the road. (*Ibid.*) The employer did not show that the need for privacy outweighed these substantial interests.

While recognizing that PERB decisions "are due some deference," the County asserts they are not persuasive because they draw upon precedents decided under the NLRA. As explained, however, federal authorities are relevant and properly examined for guidance in interpreting similar provisions in our state's labor laws. The *Golden Empire* analysis provides persuasive guidance here. [\*922]

Courts generally defer to PERB's construction of labor law provisions within its jurisdiction. (See *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 856 [191 Cal. Rptr. 800, 663 P.2d 523] [EERA]; *Paulsen v. Local No. 856 of Internat. Brotherhood of Teamsters* (2011) 193 Cal.App.4th 823, 830 [123 Cal. Rptr. 3d 332] [MMBA].) "... PERB is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.' [Citation]." (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804 [244 Cal. Rptr. 671, 750 P.2d 313].) We follow PERB's interpretation unless it is clearly erroneous. (*Ibid.*) Here, it is not. PERB's conclusion that the duty of good faith bargaining generally requires disclosure of employee contact information is consistent with the language and purpose of the MMBA, its own decisions interpreting it, and long-standing precedent under the NLRA. Nothing in the language or legislative history of the MMBA persuades us to upset this settled understanding.

### 3. The MMBA Requires Disclosure of Contact Information

The County makes several arguments to counter this analysis. None is availing. First, the County relies on two MMBA provisions to argue against disclosure.

[HNS] Section 3505 requires public employers to "meet and confer in good faith [with union representatives] regarding wages, hours, and other terms and conditions of employment ... ." The statute states that the duty to meet and confer includes a duty to negotiate "to exchange freely information, opinions, and proposals,

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and to endeavor to reach agreement on [\*\*\*494] matters within the scope of representation ... ." (§ 3505.) The County asserts that the phrase "matters within the scope of representation" pertains only to the terms and conditions of employment and that employee addresses and phone numbers are not information that must be freely exchanged.

(5) Initially, the County's position is inconsistent with the language of the statute. [HN6] The meet and confer duty requires parties "to exchange freely information ... and to endeavor to reach agreement on matters within the scope of representation ... ." (§ 3505, *italics added*.) The phrase "matters within the scope of representation" describes the subjects on which the parties must seek [\*\*\*1113] agreement. It does not modify, or limit, the information that must be freely exchanged.

Further, the County's narrow interpretation is not supported by precedent. It has long been held that "[o]ne aspect of the duty to bargain 'collectively in [\*923] good faith with labor organizations' [citation] requires the employer to make a reasonable and diligent effort to comply with the union's request for relevant information. [Citation]." (*Cardinal Distributing Co. v. Agricultural Labor Relations Bd.* (1984) 159 Cal. App. 3d 758, 762 [205 Cal. Rptr. 860].) Doing so serves the MMBA's underlying policy of fostering informed collective bargaining. Accordingly, appellate courts have held that an employer's failure to provide such information constitutes a refusal to bargain in good faith. (*Cardinal Distributing Co.*, at p. 762.) The County argues the employee information at issue here is not relevant. Yet NLRB and PERB decisions undermine that assertion. (See, e.g., *Bakersfield*, *supra*, PERB Dec. No. 1262 at pp. 17-18.)

(6) The County next argues that another MMBA provision, section 3507, does not compel disclosure of employees' home addresses and phone numbers. [HN7] Section 3507 lists several subjects on which a public employer may adopt rules to govern employment relations. Among these topics, the statute allows employers to adopt a rule for "[f]urnishing nonconfidential information pertaining to employment relations to employee organizations." (§ 3507, *subd. (a)(8)*.) Relying on the statutory construction canon *expressio unius est exclusio alterius*,<sup>15</sup> the County argues that because a rule may be adopted for the furnishing of

nonconfidential information, the Legislature must have intended to bar the disclosure of confidential information, including home addresses and telephone numbers. This assertion begs the next question we will address because it assumes the information is confidential. Moreover, PERB decisions interpreting the MMBA make it clear that [HN8] section 3507 is not the source of the duty to disclose. Rather, a public employer's disclosure obligation arises from sections 3503, concerning unions' right to represent employees, and 3505, concerning employers' obligation to bargain in good faith. (See *Golden Empire*, *supra*, PERB Dec. No. 1704-M at p. 19.)

15 This phrase means "[e]xpression of one thing is the exclusion of another." (Black's Law Dict. (4th rev. ed. 1968) p. 692, col. 1; see *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 389 [97 Cal. Rptr. 3d 464, 212 P.3d 736].)

The County further contends the MMBA's legislative history shows that it was not intended to require the disclosure sought here. However, the County points to nothing in the legislative history that even mentions the issue. First, the County cites committee reports describing general opposition to codifying collective bargaining rules for public sector employees. But strong sentiments were also expressed [\*\*\*495] in favor of collective bargaining (see, e.g., Assem. Interim Com. on Industrial Relations, Final Rep. on Assem. Bill No. 607 (1959 Reg. Sess.), and the MMBA was ultimately enacted.<sup>16</sup>

16 At the County's request, we have taken judicial notice of legislative materials for several bills, from 1959 through 1968, that the Legislature considered in enacting the MMBA.

[\*924]

Second, the County claims the legislative history demonstrates resistance to importing NLRB requirements into public sector collective bargaining. Specifically, one committee report observed that an amendment to the MMBA's "meet and confer" requirement was not intended to replicate the same procedure for collective bargaining in the private sector. (Assem. Com. on State Employment, Retirement, and Military Affairs, Summary of Major 1968 Legislation (1967 Reg. Sess.)) Whereas good faith under the NLRA requires "sincere attempts by both sides to reach agreement," the meet and confer provision of the MMBA was intended primarily to formalize and improve communications between the

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bargaining parties. (Assem. Com. on State Employment, Retirement, and Military Affairs, Summary of Major 1968 Legislation, p. 4.) The County cites this discussion as evidence that the Legislature did not intend to import all collective bargaining practices under the NLRA into the state law governing public employment relations. We need not resolve that question. Even if the [\*1114] County's interpretation is correct, it does not follow that the Legislature intended that California's courts and regulatory bodies ignore settled law under the NLRA when interpreting identical provisions in the MMBA. On the contrary, we have expressly approved of reference to the NLRA and cases interpreting it for guidance in construing our state's labor laws. (*Fire Fighters Union v. City of Vallejo*, *supra*, 12 Cal.3d at p. 617.) Nor does it follow that the Legislature intended to exempt public employers from the obligation to disclose employee contact information when the statutory language and legislative history of the MMBA are completely silent on the point.

Notably, the Legislature has expressly approved the disclosure of contact information for some public employees. Section 6254.3 creates an exception to the *California Public Records Act* (§ 6250 *et seq.*) for state, school district, and county office of education employees. Under this statute, employees' home addresses and telephone numbers are generally exempt from public inspection, except that the information may be disclosed to "an employee organization pursuant to regulations and decisions of the [PERB] ... ." (§ 6254.3, *subd.* (a)(3).)<sup>17</sup> Accordingly, although the contact information for state employees and certain county and local employees is generally to be kept private from the public at large, the Legislature has specifically authorized its disclosure to unions in accordance with PERB precedent.<sup>18</sup>

17 The statute makes an exception to this exception for law enforcement employees, whose home addresses and telephone numbers are not to be disclosed. (§ 6254.3, *subd.* (a)(3).)

18 A regulation implementing this provision requires that the state provide employee unions with the home addresses of all represented employees. (*Cal. Code Regs.*, tit. 8, § 40165.) *Amicus curiae* California Department of Personnel Administration states that it has provided home addresses to various employee unions in accordance with section 6254.3 since 1984.

[\*925]

In a related point, the County asserts its conduct was appropriate under a local ordinance. The ordinance states, in relevant part: [HN9] "To facilitate negotiations, the county [\*\*\*496] shall provide to certified employee organizations concerned the published data it regularly has available concerning subjects under negotiation ... ." (L.A. County Code, § 5.04.060, *subd.* A.) The County contends it had no obligation to disclose addresses and phone numbers because they were not published and do not concern a subject under negotiation. However, the agency charged with enforcing the ordinance concluded otherwise. The ERCOM hearing officer observed that the agency had never limited the information to be disclosed to the material described in the ordinance. The ordinance simply describes a type of information the County must provide to the union; it does not purport to limit or prohibit additional disclosures.

(7) In any event, even if the County's interpretation of the ordinance were correct, it would have no effect because [HN10] local rules cannot conflict with the MMBA. "The MMBA deals with a matter of statewide concern, and its standards may not be undercut by contradictory rules or procedures that would frustrate its purposes. [Citations.] Local regulation is permitted only if 'consistent with the purposes of the MMBA.' [Citation.]" (*International Federation of Prof. & Technical Engineers v. City and County of San Francisco* (2000) 79 Cal.App.4th 1300, 1306 [94 Cal. Rptr. 2d 790].) Thus, the ordinance could not absolve the County of its broader duty under the MMBA to provide the information requested by the union.

#### 4. Conclusion

Consistent with PERB's long-standing interpretation of the MMBA and similar labor law provisions, SEIU's request for home addresses and phone numbers of the County employees it represented called for presumptively relevant information. The burden was therefore on the County to prove that the contact information was not relevant or to supply adequate reasons why the information could not be supplied. (*San Diego Newspaper Guild*, *supra*, 548 F.2d at p. 867; see *Modesto City Schools & High School Dist.*, *supra*, PERB Dec. No. 479 at p. 10 [burden is on employer to show that disclosure would violate a right of privacy].) Because the County failed to do so, its refusal to provide the information [\*\*\*1115] violated the duty to meet and

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confer in good faith. (§ 3505; see *Golden Empire*, *supra*, PERB Dec. No. 1704-M at pp. 6-8; *Bakersfield*, *supra*, PERB Dec. No. 1262 at p. 22.)

#### *B. Disclosure Does Not Violate the Constitutional Right of Privacy*

The foregoing analysis is based on settled labor law principles. Whether California's constitutional right of privacy requires a different resolution is a novel question. [\*926]

In 1972, Californians, by initiative, added an explicit right to privacy in the state's Constitution: [HN11] "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (*Cal. Const., art. I, § 1*, italics added.)

(8) In *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 [26 Cal. Rptr. 2d 834, 865 P.2d 633] (*Hill*), this court established a framework for analyzing constitutional invasion of privacy claims. [HN12] An actionable claim requires three essential elements: (1) the claimant must possess a legally protected privacy interest (*id.* at p. 35); (2) the claimant's expectation of privacy must be objectively reasonable (*id.* at pp. 36-37); and (3) the invasion of privacy complained of must [\*\*\*497] be serious in both its nature and scope (*id.* at p. 37). If the claimant establishes all three required elements, the strength of that privacy interest is balanced against countervailing interests. (*id.* at pp. 37-38.) In general, the court should not proceed to balancing unless a satisfactory threshold showing is made. A defendant is entitled to prevail if it negates any of the three required elements. (*id.* at p. 40; see *Pioneer Electronics*, *supra*, 40 Cal.4th at p. 373.) A defendant can also prevail at the balancing stage. An otherwise actionable invasion of privacy may be legally justified if it substantively furthers one or more legitimate competing interests. (*Hill*, at p. 40.) Conversely, the invasion may be unjustified if the claimant can point to "feasible and effective alternatives" with "a lesser impact on privacy interests." (*Ibid.*)

The question in *Hill* was whether *California Constitution, article I, section 1* supports a cause of action for invasion of privacy. Here, the question is somewhat different. The County claims it is obligated to assert employees' privacy rights and that this obligation

relieves it of any duty to honor the union's requests. Nevertheless, *Hill* provides a useful framework for examining how competing interests are managed in the privacy context.

[HN13] (9) "[I]n applying the *Hill* balancing test, trial courts necessarily have broad discretion to weigh and balance the competing interests. (*Hill*, *supra*, 7 Cal.4th at pp. 37-38.)" (*Pioneer Electronics*, *supra*, 40 Cal.4th at p. 371.) The trial court here found that County employees who are not union members have a substantial interest in maintaining the privacy of their home addresses and telephone numbers. The court gave this interest additional weight because the employees had exercised their constitutional right *not* to associate with the union. However, on balance, the court concluded SEIU's interest in contacting the employees it represents "significantly outweighs" nonmembers' interest in preventing disclosure of the information. After examining each of the *Hill* factors, we agree with the trial court that disclosure was required. [\*927]

#### *1. Legally Protected Privacy Interest*

[HN14] (10) Legally recognized privacy interests include "interests in precluding the dissemination or misuse of sensitive and confidential information," which *Hill* described under the umbrella term "informational privacy." " (*Hill*, *supra*, 7 Cal.4th at p. 35.) The parties agree that County employees have a legally protected privacy interest in their home addresses and telephone numbers. "Courts have frequently recognized that individuals have a substantial interest in the privacy of their home. [Citations.]" (*Planned Parenthood* [\*\*1116] *Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 359 [99 Cal. Rptr. 2d 627].) In particular, the "privacy interest in avoiding unwanted communication" is stronger in the context of an individual's home than in a more public setting. (*Hill v. Colorado* (2000) 530 U.S. 703, 716 [147 L. Ed. 2d 597, 120 S. Ct. 2480].) Accordingly, home contact information is generally considered private. The next question is whether nonmember employees could reasonably expect that their contact information would be shielded from the union.

#### *2. Reasonable, Although Reduced, Expectation of Privacy*

[HN15] (11) "A 'reasonable' expectation of privacy is an objective entitlement founded on [\*\*\*498] broadly based and widely accepted community norms." (*Hill*, *supra*, 7 Cal.4th at p. 37.) The reasonableness of a

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privacy expectation depends on the surrounding context. We have stressed that "customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy." (*Id.* at p. 36.)

The practice followed for many years in Los Angeles County contributed to a reasonable expectation of privacy. The County employs approximately 55,000 people. Of this group, 14,500 employees have chosen *not* to join the union. Throughout the decades that SEIU has been the exclusive bargaining representative of these employees, the County has not given their home contact information to the union. Since 1994, the County and SEIU have used ERCOM, or a third party clearinghouse, to mail *Hudson* notices to nonmember employees. It is undisputed that the County has never disclosed the employees' home addresses or telephone numbers to the union. Considering this long-standing and consistent practice, it was reasonable for nonmember employees to expect that the County would continue to keep their home contact information private.

(12) Nonmember employees gave their home addresses and telephone numbers to the County for the limited purpose of securing employment. [HN16] A job applicant who provides personal information to a prospective employer can reasonably expect that the employer will not divulge the information outside [\*928] the entity except in very limited circumstances. For example, various laws require employers to disclose information to governmental agencies, such as the Internal Revenue Service and Social Security Administration, and disclosure may also be necessary for banks or insurance companies to provide employee benefits. (See *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, 561 [57 Cal. Rptr. 3d 197] (*Belaire-West*).) But beyond these required disclosures, it is reasonable for employees to expect that their home contact information will remain private "in light of employers' usual confidentiality customs and practices." (*Ibid.*) The County followed its long-standing custom and practice when it refrained from disclosing the home addresses and telephone numbers of nonunion employees.

Moreover, as the trial court observed, employees who exercised their right *not* to associate with the union have a somewhat enhanced privacy expectation. The record reflects that just over half of the approximately 14,500 nonmember employees voluntarily gave home

contact information to SEIU when completing their annual *Hudson* notice forms. The remaining 7,222 nonmember employees chose not to disclose this information, although in most cases they had numerous opportunities to do so.

Both courts below determined that County employees had a reasonable expectation of privacy in their home addresses and phone numbers. For the reasons discussed, we agree. However, we note that the reasonableness of this expectation was somewhat reduced in light of the common practice of other public employers to give unions this information.

Custom and practice can reduce reasonable expectations of privacy in information typically considered even more sensitive than addresses and phone numbers. In *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 327 [64 Cal. Rptr. 3d 693, 165 P.3d 488] (*IFPTE*), a group [\*\*1117] of reporters filed a California Public Records Act (§ 6250 *et seq.*) request for the names, job titles, and gross salaries of City of Oakland employees [\*\*\*499] earning over \$100,000. We acknowledged that "many individuals, including public employees, may be uncomfortable with the prospect of others knowing their salary and ... would share that information only on a selective basis, even within the workplace." (*IFPTE*, at p. 331.) We also acknowledged that public disclosure of salary information could cause discomfort and embarrassment. (*Ibid.*) Nonetheless, we concluded the city's employees lacked a reasonable expectation of privacy in light of the Attorney General's long-standing opinion that government payroll information is public, the widespread practice of state and local governments to disclose this information, and the strong public policy favoring transparency in government. (*IFPTE*, at pp. 331-332, 338.) [\*929]

As in *IFPTE*, disclosure of employees' home contact information to their union "is overwhelmingly the norm." (*IFPTE*, *supra*, 42 Cal.4th at p. 332.) For nearly 50 years, private employers have been required to disclose contact information to employees' unions. (See *Prudential*, *supra*, 412 F.2d at p. 84; *Excelsior Underwear, Inc.*, *supra*, 56 N.L.R.B. at p. 1241.) Based on these federal precedents, we remarked almost 30 years ago that requiring employers to furnish lists of employee names and addresses to facilitate communication with a

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union "is hardly novel in the arena of labor relations." (*Cartan v. Agricultural Labor Relations Bd.*, *supra*, 36 Cal.3d at p. 665.) As discussed, PERB has held that the same disclosure rules apply to public employment under various California labor statutes, including the MMBA. (See *Golden Empire*, *supra*, PERB Dec. No. 1704-M, at pp. 6-8; *Bakersfield*, *supra*, PERB Dec. No. 1262, at p. 22.) Thus, when the information is requested, established precedent requires that all private employers and most public employers provide unions with contact information for all employees in the represented bargaining unit. Although we have concluded that, on balance, it was reasonable for County employees to expect that their information would not be disclosed to SEIU because of the long-standing practice in Los Angeles County, the reasonableness of this privacy expectation was reduced in light of the widespread, settled rules requiring disclosure elsewhere. (See *Pioneer Electronics*, *supra*, 40 Cal.4th at p. 372 [customers who had given their contact information to a manufacturer in connection with a product complaint had a "reduced" expectation of privacy].)

### 3. Serious Invasion of Privacy

[HN17] (13) "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Hill*, *supra*, 7 Cal.4th at p. 37.) The disclosure contemplated in this case was more than trivial. It rose to the level of a "serious" invasion of privacy under *Hill*.

In *Dept. of Defense*, *supra*, 510 U.S. 487, the Supreme Court considered a union request similar to the one SEIU makes here. The court observed: "Perhaps some of these individuals have failed to join the union that represents them due to lack of familiarity with the union or its services. Others may be opposed to their union or to unionism in general on practical or ideological grounds. Whatever the reason that these employees have chosen not to become members of the union or to provide the union with their addresses, however, it is clear that they have some nontrivial privacy interest in [\*\*\*500] nondisclosure, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure." (*Id.* at pp. 500-501, fn. & italics omitted.) [\*930]

In *Pioneer Electronics*, *supra*, 40 Cal.4th at pages 372-373, we found that disclosure of customer contact

information to a class action plaintiff would not impose a serious [\*931] invasion of privacy. There, however, the customers had already disclosed their contact information to the manufacturer when complaining about an [\*1118] allegedly defective product. The question was whether a second disclosure of that information to a class action plaintiff asserting the same complaint would constitute a serious invasion of privacy. (*Ibid.*) In finding it would not, we observed that the rules of civil discovery generally permit plaintiffs to discover contact information for potential class members in order to identify additional parties who might assist in prosecuting the case. (*Id.* at p. 373.) Courts of Appeal have regularly allowed the release of contact information sought in class action discovery. (See, e.g., *Crab Addison, Inc. v. Superior Court* (2008) 169 Cal.App.4th 958, 974 [87 Cal. Rptr. 3d 400]; *Lee v. Dymamex, Inc.* (2008) 166 Cal.App.4th 1325, 1336-1338 [83 Cal. Rptr. 3d 241]; *Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1426-1427 [82 Cal. Rptr. 3d 470]; *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1245 [70 Cal. Rptr. 3d 701]; *Belaire-West*, *supra*, 149 Cal.App.4th at p. 562.) Indeed, "it is only under unusual circumstances that the courts restrict discovery of nonparty witnesses' residential contact information." (*Puerto v. Superior Court*, *supra*, 158 Cal.App.4th at p. 1254.) The context here is different. The party seeking the information is a union the employees have chosen not to join and have declined in the past to give their contact information. Under these circumstances, disclosure to the union would create a more significant invasion of privacy than disclosure in the class action context.

Moreover, the release of contact information contemplated in *Pioneer Electronics* would have occurred only after the customers had been given notice of the proposed disclosure and an opportunity to object. (*Pioneer Electronics*, *supra*, 40 Cal.4th at pp. 372-373.) These protections mitigated any privacy invasion caused by the disclosure.

### 4. Balancing of Interests Favors Disclosure

(14) Because the County made a sufficient showing on the essential elements of a privacy claim, we next consider whether the invasion of privacy is justified because it would further a substantial countervailing interest. (See *Hill*, *supra*, 7 Cal.4th at p. 40.) [HN18] "Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests

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derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Id.* at p. 38.) Here, the balance favors disclosure.

SEIU's interest in obtaining residential contact information for all employees it represents is both legitimate and important. As discussed, a union elected as an [\*\*\*501] exclusive bargaining agent owes a duty of fair representation to *all* employees in the bargaining unit it represents, including employees who are not union members. (See *Jones v. Omnitrans*, *supra*, 125 Cal.App.4th at p. 283.)

[HN19] (15) A union breaches the duty of representation if it fails to inform employees about the status of negotiations (*Kern High Faculty Assn. CTA/NEA* (2006) PERB Dec. No. 1834) or changes in the contractual terms of their employment (*Teamsters Local 896 (Anheuser-Busch)* (1986) 280 N.L.R.B. 565, 575). Because the union's duty extends to all employees in the bargaining unit, regardless of union membership, the union must have the means of communicating with all employees on these important topics. In addition, a union must give nonmembers an opportunity to express their views on bargaining matters, even if these employees do not have a vote. (*El Centro Elementary Teachers Assn.* (1982) PERB Dec. No. 232.) Direct communication between unions and all bargaining unit employees is essential to ensure that nonmembers' opinions are heard. Finally, as discussed, every year the union must send *Hudson* notices to all employees explaining how their dues are used. (*Hudson*, *supra*, 475 U.S. 292.) [\*\*\*1119] The obligation to send *Hudson* notices falls on the union, not the employer, and a union commits an unfair business practice if it collects an agency fee without providing a proper notice. (*UPTE, CWA Local 9119* (2005) PERB Dec. No. 1784-H; see *Knight v. Kenai Peninsula Borough School Dist.* (9th Cir. 1997) 131 F.3d 807, 817 [employer has no duty to ensure adequacy of union's *Hudson* notice].)

Giving SEIU this contact information will not coerce employees into joining the union. An employee who chooses not to join a union still enjoys the benefits of union representation. "[T]here is a clear distinction

between union membership and majority support for collective bargaining representatives." (*N.L.R.B. v. Walkill Valley General Hospital* (3d Cir. 1989) 866 F.2d 632, 637.)

Moreover, as several decisions on this subject have noted, alternative means for unions to communicate with nonmembers are often inadequate. Bulletin board postings may not meaningfully convey lengthy or complex [\*932] information, and employers often monitor the materials posted. (*Prudential*, *supra*, 412 F.2d at pp. 81-82.) A posting provides only one-way communication and is not an avenue for unions to receive employees' views. (*Id.* at p. 82.) Other alternatives, such as union meetings and worksite visits by union representatives, are inefficient and ineffective means of communicating with large and dispersed groups of employees. (See *Golden Empire*, *supra*, PERB Dec. No. 1704-M, at p. 7.)

In contrast, the privacy intrusion occasioned by disclosure of contact information to the union is reduced. As discussed, County employees' expectation of privacy is undermined by the common practice of disclosure in other settings. For decades, the NLRB has required private employers to furnish unions with employees' home contact information (see, e.g., *Prudential*, *supra*, 412 F.2d at p. 84), and PERB has required most California public employers to make the same disclosure (see, e.g., *Golden Empire*, *supra*, PERB Dec. No. 1704-M, at pp. 6-8). The invasion of nonmember employees' privacy, while sufficiently serious to pass muster under the *Hill* test, is also comparatively mild. Nonmember employees may experience increased contact with the union by mail or other means (see *Dept. of Defense*, *supra*, 510 U.S. at pp. 500-501), but there is no evidence SEIU has ever [\*\*\*502] engaged in any harassment of a nonmember. If harassment is a concern, employers may bargain for, or ERCOM may adopt, procedures that allow nonmembers to opt out and prevent disclosure of their contact information. (Cf. § 6254.3, *subd.* (b) [allowing certain employees to prevent disclosure of contact information by written request].) Although we have concluded that a balancing of interests generally favors disclosure, this balance might, in some cases, tip in favor of privacy when an individual employee objects and demands that home contact information be withheld.

*C. Court May Not Impose Procedural Safeguards in a*

*Mandate Proceeding*

A final question raised by the Court of Appeal's decision is the availability of what it termed "procedural safeguards," giving employees the ability to object and prevent disclosure. The court below imposed a notice and opt-out procedure without balancing, or even considering, the union's interests in obtaining the requested information. In creating this procedure, the court expressly ignored labor decisions finding that unions are entitled to contact information and instead likened this case to the discovery of third party information in the class action context. Borrowing from *Pioneer Electronics, supra*, 40 Cal.4th 360, and other class action cases, the Court of Appeal held that nonmember employees had to be given notice and an opportunity to object before the County disclosed their contact information to SEIU. [\*933]

(16) The parties here agree that the Court of Appeal overstepped its authority by ordering them to implement specific notice and opt-out procedures. (HN20) *Code of Civil Procedure* section 1094.5, subdivision (f) expressly limits the remedies a court may order when reviewing administrative orders and decisions. The court can deny the writ or grant it and set aside the decision. If it sets aside the decision, the court can order the [\*1120] agency to take further action, but it cannot "limit or control in any way the discretion legally vested in" the agency. (*Code Civ. Proc.*, § 1094.5, subd. (f).) Here, rather than simply setting aside ERCOM's decision, the Court of Appeal directed the trial court to order: (1) that the County and SEIU meet and confer on a proposed notice for the trial court's review and approval; and (2) that the County send the approved notice to all nonmember employees. This disposition exceeded the court's codified authority because it stripped ERCOM of all discretion regarding the manner of disclosure. Further, implementation of the order would have required ERCOM to create new administrative procedures for resolving disputes over notice and opt-out rights.

Although the Court of Appeal exceeded its authority by imposing a notice and opt-out requirement, other

avenues for implementing privacy safeguards are available. Employers like the County remain free to bargain for a notice and opt-out procedure in negotiating collective bargaining agreements with employee unions. Public employers can also draft employment contracts that will notify employees their home contact information is subject to disclosure to the union and permit employees to request nondisclosure. Finally, nothing in the relevant statutes or case law appears to prohibit agencies such as PERB or ERCOM from developing notice and opt-out procedures that would allow employees to preserve the confidentiality of their home addresses and telephone numbers.<sup>19</sup>

19 Such procedures have been developed in other public employment settings. For example, employees covered by the California Public Records Act can prevent release of their home addresses and telephone numbers by stating their objection in writing that they do not want this information disclosed to the union. (§ 6254.3, subd. (b); see *Golden Empire, supra*, PERB Dec. No. 1704-M, at p. 5; *State Center Community College Dist.* (2001) PERB Dec. No. 1471, at p. 5.)

## [\*\*\*503] D. Conclusion

(17) Long-standing case law and public policy support direct communication between unions and the employees they represent. On balance, we conclude SEIU's interest in communicating with all County employees significantly outweighs nonmembers' interest in preserving the privacy of their contact information. [\*934]

## III. DISPOSITION

The Court of Appeal's decision is reversed. The matter is remanded for entry of judgment denying the County's petition for writ of mandate.

Cantil-Sakaue, C. J., Kennard, J., Baxter, J., Werdegar, J., Chin J., and Liu, J., concurred.



LexisNexis®

In re GREG F., a Person Coming Under the Juvenile Court Law. THE PEOPLE,  
Plaintiff and Respondent, v. GREG F., Defendant and Appellant.

S191868

SUPREME COURT OF CALIFORNIA

55 Cal. 4th 393; 283 P.3d 1160; 146 Cal. Rptr. 3d 272; 2012 Cal. LEXIS 8224

August 27, 2012, Filed

**SUBSEQUENT HISTORY:** Reported at *In re Greg F.*, 2012 Cal. LEXIS 8855 (Cal., Aug. 27, 2012) Time for Granting or Denying Rehearing Extended *In re Greg F.*, 2012 Cal. LEXIS 8650 (Cal., Sept. 12, 2012) Rehearing denied by *In re Greg F.*, 2012 Cal. LEXIS 10222 (Cal., Oct. 31, 2012)

**PRIOR HISTORY:**

Superior Court of Sonoma County, No. 35283J, Raina H. Ballinger, Judge. Court of Appeal, First Appellate District, Division Five, No. A127161.

*In re Greg F.*, 192 Cal. App. 4th 1252, 121 Cal. Rptr. 3d 247, 2011 Cal. App. LEXIS 198 (Cal. App. 1st Dist., 2011)

LexisNexis(R) Headnotes

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Preliminary Proceedings*  
*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN1] Although juvenile delinquency proceedings have been called quasi-criminal, they are fundamentally different from adult criminal proceedings and require that a balance be struck between the informality and flexibility necessary in juvenile proceedings and attention to the juvenile's constitutional rights. One important difference between juvenile delinquency and adult

criminal proceedings is the speed with which juvenile proceedings must begin and progress. Much must be completed in a narrow timeframe. When there is reasonable cause to believe a minor has violated a law defining a crime, law enforcement may take the minor into temporary custody. *Welf. & Inst. Code*, §§ 602, subd. (a), 625, subd. (a). If the minor is detained, law enforcement must deliver the minor without unnecessary delay to the probation officer in an appropriate county pursuant to *Welf. & Inst. Code*, §§ 626, subd. (d), 626.5, subd. (b), and provide the probation officer with incident reports pursuant to *Welf. & Inst. Code*, §§ 626, subd. (c), 626.5, subd. (a).

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Preliminary Proceedings*  
*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN2] A probation officer must immediately investigate the circumstances of a minor and the facts surrounding his or her being taken into custody and determine if continued detention is necessary. *Welf. & Inst. Code*, § 628, subd. (a). If the probation officer determines that the minor is already a ward of the juvenile court, the officer can file a *Welf. & Inst. Code*, § 777, notice. § 777, subds. (a), (b). If the minor is not a ward and the probation officer determines that delinquency proceedings should be initiated, the officer refers the matter to a prosecuting attorney for the filing of a *Welf. & Inst. Code*, § 602, petition. *Welf. & Inst. Code*, §§ 630, 630.5, 630.5, subd. (b)

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If a § 777 notice or § 602 petition is not filed within 48 hours (excluding noncourt days) after the minor was taken into custody, the minor must be released. *Welf. & Inst. Code*, § 631, subd. (a); *Cal. Rules of Court*, rule § 752(b). A detention hearing must be held by the next judicial day after a petition or notice is filed. *Welf. & Inst. Code*, § 632, subd. (a). At the detention hearing, the court reviews the probation officer's report to determine whether continued detention of the minor is necessary. *Welf. & Inst. Code*, § 636; *Cal. Rules of Court*, rule 5.760.

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Adjudication*  
*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN3] The next step following a *Welf. & Inst. Code*, § 602, petition is the jurisdictional hearing, at which the court decides whether a crime has been committed. *Welf. & Inst. Code*, § 701. Offenses alleged in the § 602 petition must be proven true beyond a reasonable doubt and be supported by evidence legally admissible in the trial of criminal cases. § 701. If the minor is detained, the jurisdictional hearing must be held within 15 judicial days after the detention order. *Welf. & Inst. Code*, § 657, subd. (a)(1). The minor may admit the allegations in the § 602 petition at the detention hearing and waive further jurisdictional proceedings. § 657, subd. (b).

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition*  
*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN4] Once jurisdiction on a *Welf. & Inst. Code*, § 602, petition is established, the case proceeds to a dispositional hearing. At this hearing, the court considers the probation officer's social study and other evidence to determine an appropriate disposition. *Welf. & Inst. Code*, § 706. In reaching a disposition, the court considers (1) the minor's age, (2) the circumstances and gravity of the offense, and (3) the minor's previous delinquent history. *Welf. & Inst. Code*, § 725.5. The court may place the minor on probation, with or without declaring the minor a ward of the court, or it may declare the minor a ward and order appropriate treatment and placement. *Welf. & Inst. Code*, §§ 725, 726. Placement options include the home of a relative or extended family member; a suitable licensed community care facility or foster home; juvenile hall; a ranch, camp or forestry camp; and, the most

restrictive setting, the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. *Welf. & Inst. Code*, §§ 727, subd. (a), 730, subd. (a), 731, subd. (a)(4). The court can also set aside the jurisdictional findings and dismiss the petition if it finds that the interests of justice and the welfare of the minor require a dismissal, or if it finds that the minor is not in need of treatment or rehabilitation. *Welf. & Inst. Code*, § 782.

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition*  
*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN5] The commitment limitation in *Welf. & Inst. Code*, § 733, subd. (c), provides that a juvenile ward may not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) if the ward has been or is adjudged a ward of the court pursuant to *Welf. & Inst. Code*, § 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in *Welf. & Inst. Code*, § 707, subd. (b) (violent felony offenses), or of *Pen. Code*, § 290.008, subd. (c) (sex offenses). Thus, a DJF commitment must be based on a recent violent offense or sex crime adjudicated in a delinquency petition. It cannot be ordered based on a past offense in the ward's juvenile record if the ward's most recent offense does not qualify.

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition*  
*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN6] Because the commitment limitation in *Welf. & Inst. Code*, § 733, subd. (c), depends on the nature of the most recent offense alleged in any petition, the statute does not bar Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitments imposed for probation violations on qualifying offenses. A probation violation procedure is initiated under *Welf. & Inst. Code*, § 777, by the filing of a notice, not a petition. A probation violation proceeding involves a different standard of proof than a *Welf. & Inst. Code*, § 602, proceeding, and it does not result in the charging or adjudication of a criminal offense, even if the conduct alleged is criminal. Moreover, if a violation is established, the most restrictive placement the court can impose is the maximum term of confinement on the original offense for which the ward was placed on probation.

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Pretrial Motions*  
[HN7] See *Welf. & Inst. Code*, § 782.

*Governments > Legislation > Interpretation*

[HN8] A court's fundamental task in construing a statute is to ascertain the Legislature's intent and effectuate the law's purpose. The court begins its inquiry by examining the statute's words, giving them a plain and commonsense meaning. In doing so, however, the court does not consider the statutory language in isolation. Rather, the court looks to the entire substance of the statute in order to determine the scope and purpose of the provision. That is, the court construes the words in question in context, keeping in mind the nature and obvious purpose of the statute. The court must harmonize the various parts of a statutory enactment by considering the particular clause or section in the context of the statutory framework as a whole. The court must also avoid a construction that would produce absurd consequences, which courts presume the Legislature did not intend.

*Governments > Legislation > Interpretation*

[HN9] When the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like "notwithstanding any other law" or "notwithstanding other provisions of law."

*Governments > Legislation > Interpretation*

[HN10] The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute. The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.

*Governments > Legislation > Effect & Operation > Amendments*

*Governments > Legislation > Interpretation*

[HN11] An implied amendment is an act that creates an addition, omission, modification or substitution and changes the scope or effect of an existing statute. Amendments by implication are disfavored and should be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such

as where they are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.

*Governments > Legislation > Interpretation*

[HN12] The principle that a specific statute prevails over a general one applies only when the two sections cannot be reconciled. If a court can reasonably harmonize two statutes dealing with the same subject, then the court must give concurrent effect to both, even though one is specific and the other general. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.

*Governments > Legislation > Interpretation*

[HN13] In interpreting a statute, courts are obligated to adopt a common sense construction over one leading to mischief or absurdity.

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition*

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Pretrial Motions*  
*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN14] The statutory scheme governing juvenile delinquency is designed to give the court maximum flexibility to craft suitable orders aimed at rehabilitating the particular ward before it. Flexibility is the hallmark of juvenile court law, in both delinquency and dependency interventions. The juvenile court has long enjoyed great discretion in the disposition of juvenile matters, and that discretion is codified in *Welf. & Inst. Code*, § 782. To interpret *Welf. & Inst. Code*, § 733, subd. (c), as cutting off the juvenile court's broad discretion to order an appropriate disposition, simply because the wrong document was filed, would elevate form over substance and create an absurd result the Legislature could not have intended. When a Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitment for a *Welf. & Inst. Code*, § 707, subd. (b), offense for which probation was ordered serves the interests of justice and the welfare of the minor, the juvenile court has discretion to dismiss a new *Welf. & Inst. Code*, § 602, petition to permit treatment of the matter as a probation violation.

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*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Pretrial Motions*

*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN15] Juvenile proceedings are conducted not only for the protection of society, but for the protection and benefit of the youth involved. Juvenile court action thus differs from adult criminal prosecutions where a major goal is convictive confinement of the defendant for the protection of society. The protective goal of the juvenile proceeding is that the child shall not become a criminal in later years, but a useful member of society. In contrast to the more punitive aims of the adult criminal justice system, the purpose of the juvenile justice system is (1) to serve the best interests of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and enable him or her to be a law-abiding and productive member of his or her family and community, and (2) to provide for the protection and safety of the public. *Welf. & Inst. Code*, § 202. To this end, the language of *Welf. & Inst. Code*, § 782, specifically requires that any dismissal of a delinquency petition serve both the interests of justice and the welfare of the minor.

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition*

*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN16] A Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) commitment is not necessarily contrary to a minor's welfare. The DJF has many rehabilitative programs that can benefit delinquent wards. Some wards may be best served by the structured institutional environment and special programs available only at the DJF. In determining a child's best interests, the juvenile court must examine all the relevant circumstances.

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition*

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Pretrial Motions*

*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN17] The realignment policies served by *Welf. & Inst. Code*, § 733, are not so unyielding they cannot tolerate occasional exceptions when the severity of a minor's offenses, and the minor's own special needs, call for a disposition that includes the Department of Corrections

and Rehabilitation, Division of Juvenile Facilities (DJF). If the Legislature had meant to impose an absolute prohibition on DJF confinement, it would have removed the court's ability to order a DJF commitment for nonviolent probation violations. Moreover, there is no reason to assume juvenile courts will ignore the policies underlying § 733 when they exercise their discretion to dismiss a *Welf. & Inst. Code*, § 602, petition. In deciding whether a dismissal that would qualify an otherwise ineligible minor for a DJF commitment serves the interests of justice and the minor's welfare, the court must take into account all circumstances relevant to the public's need for safety and the juvenile's need for rehabilitation. Where the minor has previously failed in a series of local programs, or where no local programs will accept the minor, statewide confinement in the structured setting offered by DJF may decisively outweigh other considerations.

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Pretrial Motions*

*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN18] Termination of jurisdiction is one logical outcome to expect when the juvenile court dismisses a delinquency petition. The Legislature did not necessarily foreclose other outcomes when it enacted *Welf. & Inst. Code*, § 782, however. Section 782 was meant to codify and expand the juvenile court's discretionary dismissal power.

*Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition*

*Family Law > Delinquency & Dependency > Delinquency Proceedings*

[HN19] If a Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitment is appropriate in the context of a probation revocation, then it remains appropriate even if the prosecution files a *Welf. & Inst. Code*, § 602, petition that has to be withdrawn or dismissed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The juvenile court rendered a disposition order committing a minor to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF).

While the minor was on probation for a DJF-eligible violent felony offense (*Welf. & Inst. Code*, § 707, subd. (b)), he committed a new offense that was not DJF-eligible (*Welf. & Inst. Code*, § 733, subd. (e)). The prosecutor filed a new petition (*Welf. & Inst. Code*, § 602). The juvenile court dismissed the new petition and treated the matter as a probation violation. (Superior Court of Sonoma County, No. 35283J, Raima H. Ballinger, Judge.) The Court of Appeal, First Dist., Div. Five, No. A127161, reversed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded to that court for further proceedings. The court held that the juvenile court had discretion to dismiss the new petition (*Welf. & Inst. Code*, § 782) in order to commit the minor to DJF, based upon the juvenile court's finding that such a dismissal would best serve the interests of justice and the welfare of the minor. Where a DJF commitment is appropriate in the context of a probation revocation initiated by the filing of a notice (*Welf. & Inst. Code*, § 777), it remains appropriate even if the prosecution files a new § 602 petition that is withdrawn or dismissed. The court noted that the unusually short deadlines in juvenile delinquency matters leave the prosecution little time to investigate a minor's criminal history and to determine whether an offense should be alleged in a new petition or as a probation violation. (Opinion by Corrigan, J., with Baxter, Werdegarr, and Chin, JJ., concurring. Dissenting opinion by Cantil-Sakauye, C. J., with Kennard, and Liu, JJ., concurring (see p. 420).)

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) **Delinquent, Dependent and Neglected Children § 83--Delinquent Children--Proceedings.**--Although juvenile delinquency proceedings [\*394] have been called quasi-criminal, they are fundamentally different from adult criminal proceedings and require that a balance be struck between the informality and flexibility necessary in juvenile proceedings and attention to the juvenile's constitutional rights. One important difference between juvenile delinquency and adult criminal proceedings is the speed with which juvenile proceedings must begin and progress. Much must be completed in a narrow timeframe.

(2) **Delinquent, Dependent and Neglected Children § 84--Delinquent Children--Detention Hearing--Time**

and **Scope.**--When there is reasonable cause to believe a minor has violated a law defining a crime, law enforcement may take the minor into temporary custody (*Welf. & Inst. Code*, §§ 602, subd. (a), 625, subd. (a)). If the minor is detained, law enforcement must deliver the minor without unnecessary delay to the probation officer in an appropriate county (*Welf. & Inst. Code*, §§ 626, subd. (d), 626.5, subd. (b)) and provide the probation officer with incident reports (*Welf. & Inst. Code*, §§ 626, subd. (c), 626.5, subd. (a)). Probation officer must immediately investigate the circumstances of a minor and the facts surrounding his or her being taken into custody and determine if continued detention is necessary (*Welf. & Inst. Code*, § 628, subd. (a)). If the probation officer determines that the minor is already a ward of the juvenile court, the officer can file a *Welf. & Inst. Code*, § 777 notice (§ 777, subs. (a), (b)). If the minor is not a ward and the probation officer determines that delinquency proceedings should be initiated, the officer refers the matter to a prosecuting attorney for the filing of a *Welf. & Inst. Code*, § 602 petition (*Welf. & Inst. Code*, §§ 630, 650, 653.5, subd. (b)). If a § 777 notice or § 602 petition is not filed within 48 hours (excluding noncourt days) after the minor was taken into custody, the minor must be released (*Welf. & Inst. Code*, § 631, subd. (a); *Cal. Rules of Court*, rule 5.752(b)). A detention hearing must be held by the next judicial day after a petition or notice is filed (*Welf. & Inst. Code*, § 632, subd. (a)). At the detention hearing, the court reviews the probation officer's report to determine whether continued detention of the minor is necessary (*Welf. & Inst. Code*, § 636; *Cal. Rules of Court*, rule 5.760).

(3) **Delinquent, Dependent and Neglected Children § 95--Delinquent Children--Jurisdiction Hearing--Time and Scope.**--The next step following a *Welf. & Inst. Code*, § 602 petition is the jurisdictional hearing, at which the court decides whether a crime has been committed (*Welf. & Inst. Code*, § 701). Offenses alleged in the § 602 petition must be proven true beyond a reasonable doubt and be supported by evidence legally admissible in the trial of criminal cases (§ 701). If the minor is detained, the jurisdictional hearing must be held within 15 judicial days after the detention order (*Welf. & Inst. Code*, § 657, subd. (a)(1)). The minor may admit the allegations in the § 602 petition at the detention hearing and waive further jurisdictional proceedings (§ 657, subd. (b)).

(4) **Delinquent, Dependent and Neglected Children §**

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**105--Delinquent Children--Dispositional Hearing--Options.**--Once jurisdiction on a *Welf. & Inst. Code*, § 602, petition is established, the case proceeds to a dispositional hearing. At this hearing, the court considers the probation officer's social study and other evidence to determine an appropriate disposition (*Welf. & Inst. Code*, § 706). In reaching a disposition, the court considers (1) the minor's age, (2) the circumstances and gravity of the offense, and (3) the minor's previous delinquent history (*Welf. & Inst. Code*, § 725.5). The court may place the minor on probation, with or without declaring the minor a ward of the court, or it may declare the minor a ward and order appropriate treatment and placement (*Welf. & Inst. Code*, §§ 725, 726). Placement options include the home of a relative or extended family member; a suitable licensed community care facility or foster home; juvenile hall; a ranch, camp or forestry camp; and, the most restrictive setting, the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (*Welf. & Inst. Code*, §§ 727, subd. (a), 730, subd. (a), 731, subd. (a)(4)). The [\*395] court can also set aside the jurisdictional findings and dismiss the petition if it finds that the interests of justice and the welfare of the minor require a dismissal, or if it finds that the minor is not in need of treatment or rehabilitation (*Welf. & Inst. Code*, § 732).

**(5) Delinquent, Dependent and Neglected Children § 111--Delinquent**

**Children--Dispositions--Commitment--Qualifying Offenses.**--The commitment limitation in *Welf. & Inst. Code*, § 733, subd. (c), provides that a juvenile ward may not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) if the ward has been or is adjudged a ward of the court pursuant to *Welf. & Inst. Code*, § 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in *Welf. & Inst. Code*, § 707, subd. (b) (violent felony offenses), or of *Pen. Code*, § 290.008, subd. (c) (sex offenses). Thus, a DJF commitment must be based on a recent violent offense or sex crime adjudicated in a delinquency petition. It cannot be ordered based on a past offense in the ward's juvenile record if the ward's most recent offense does not qualify.

**(6) Delinquent, Dependent and Neglected Children § 111--Delinquent**

**Children--Dispositions--Commitment--Qualifying Offenses--Probation Violations.**--Because the commitment limitation in *Welf. & Inst. Code*, § 733,

subd. (c), depends on the nature of the most recent offense alleged in any petition, the statute does not bar Department of [\*396] Corrections and Rehabilitation, Division of Juvenile Facilities commitments imposed for probation violations on qualifying offenses. A probation violation procedure is initiated under *Welf. & Inst. Code*, § 777, by the filing of a notice, not a petition. A probation violation proceeding involves a different standard of proof than a *Welf. & Inst. Code*, § 602 proceeding, and it does not result in the charging or adjudication of a criminal offense, even if the conduct alleged is criminal. Moreover, if a violation is established, the most restrictive placement the court can impose is the maximum term of confinement on the original offense for which the ward was placed on probation.

**(7) Statutes §**

**29--Construction--Language--Legislative**

**Intent--Purpose of Law.**--A court's fundamental task in construing a statute is to ascertain the Legislature's intent and effectuate the law's purpose. The court begins its inquiry by examining the statute's words, giving them a plain and commonsense meaning. In doing so, however, the court does not consider the statutory language in isolation. Rather, the court looks to the entire substance of the statute in order to determine the scope and purpose of the provision. That is, the court construes the words in question in context, keeping in mind the nature and obvious purpose of the statute. The court must harmonize the various parts of a statutory enactment by considering the particular clause or section in the context of the statutory framework as a whole. The court must also avoid a construction that would produce absurd consequences, which courts presume the Legislature did not intend.

**(8) Statutes §**

**29--Construction--Language--Legislative**

**Intent--Contrary Law.**--When the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like "notwithstanding any other law" or "notwithstanding other provisions of law."

**(9) Statutes §**

**46--Construction--Presumptions--Legislative**

**Intent--Existing Law.**--The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute. The failure of the Legislature to change the law in a particular respect when the subject is

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generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.

(10) **Statutes § 13--Amendment--By Implication.**--An implied amendment is an act that creates an addition, omission, modification or substitution and changes the scope or effect of an existing statute. Amendments by implication are disfavored and should be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two [\*397] statutes, such as where they are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.

(11) **Statutes § 52--Construction--Codes--Conflicting Provisions--General and Specific Provisions--Harmonization.**--The principle that a specific statute prevails over a general one applies only when the two sections cannot be reconciled. If a court can reasonably harmonize two statutes dealing with the same subject, then the court must give concurrent effect to both, even though one is specific and the other general. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.

(12) **Statutes § 22--Construction--Common Sense.**--In interpreting a statute, courts are obligated to adopt a common sense construction over one leading to mischief or absurdity.

(13) **Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Discretion of Court.**--The statutory scheme governing juvenile delinquency is designed to give the court maximum flexibility to craft suitable orders aimed at rehabilitating the particular ward before it. Flexibility is the hallmark of juvenile court law, in both delinquency and dependency interventions. The juvenile court has long enjoyed great discretion in the disposition of juvenile matters, and that discretion is codified in *Welf. & Inst. Code*, § 782. To interpret *Welf. & Inst. Code*, § 733, *subd. (c)*, as cutting off the juvenile court's broad discretion to order an appropriate disposition, simply because the wrong document was filed, would elevate form over substance and create an absurd result the Legislature could not have intended. When a Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitment for a *Welf. & Inst. Code*, § 707, *subd. (b)*, offense for which probation was ordered serves the

interests of justice and the welfare of the minor, the juvenile court has discretion to dismiss a new *Welf. & Inst. Code*, § 602 petition to permit treatment of the matter as a probation violation. (Disapproving to the extent inconsistent: *V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455 [93 Cal. Rptr. 3d 851].)

(14) **Delinquent, Dependent and Neglected Children § 105--Delinquent Children--Dispositional Hearing--Best Interests of Minor.**--Juvenile proceedings are conducted not only for the protection of society, but for the protection and benefit of the youth involved. Juvenile court action thus differs from adult criminal prosecutions where a major goal is corrective confinement of the defendant for the protection of society. The protective goal of the juvenile proceeding is that the child shall not become a criminal in later years, but a useful member of society. In [\*398] contrast to the more punitive aims of the adult criminal justice system, the purpose of the juvenile justice system is (1) to serve the best interests of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and enable him or her to be a law-abiding and productive member of his or her family and community, and (2) to provide for the protection and safety of the public (*Welf. & Inst. Code*, § 202). To this end, the language of *Welf. & Inst. Code*, § 782, specifically requires that any dismissal of a delinquency petition serve both the interests of justice and the welfare of the minor.

(15) **Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Commitment--Best Interests of Minor.**--A Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) commitment is not necessarily contrary to a minor's welfare. The DJF has many rehabilitative programs that can benefit delinquent wards. Some wards may be best served by the structured institutional environment and special programs available only at the DJF. In determining a child's best interests, the juvenile court must examine all the relevant circumstances.

(16) **Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Commitment--Qualifying Offenses.**--The realignment policies served by *Welf. & Inst. Code*, § 733, are not so unyielding they cannot tolerate occasional exceptions when the severity of a minor's offenses, and the minor's own special needs, call

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for a disposition that includes the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF). If the Legislature had meant to impose an absolute prohibition on DJF confinement, it would have removed the court's ability to order a DJF commitment for nonviolent probation violations. Moreover, there is no reason to assume juvenile courts will ignore the policies underlying § 733 when they exercise their discretion to dismiss a *Welf. & Inst. Code*, § 602 petition. In deciding whether a dismissal that would qualify an otherwise ineligible minor for a DJF commitment serves the interests of justice and the minor's welfare, the court must take into account all circumstances relevant to the public's need for safety and the juvenile's need for rehabilitation. Where the minor has previously failed in a series of local programs, or where no local programs will accept the minor, statewide confinement in the structured setting offered by DJF may decisively outweigh other considerations.

(17) Delinquent, Dependent and Neglected Children § 105--Delinquent Children--Dispositional Hearing--Discretionary Dismissal Power.--Termination of jurisdiction is one logical outcome to expect when [\*399] the juvenile court dismisses a delinquency petition. The Legislature did not necessarily foreclose other outcomes when it enacted *Welf. & Inst. Code*, § 782, however. Section 782 was meant to codify and expand the juvenile court's discretionary dismissal power.

(18) Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Commitment--Qualifying Offenses.--If a Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitment is appropriate in the context of a probation revocation, then it remains appropriate even if the prosecution files a *Welf. & Inst. Code*, § 602 petition that has to be withdrawn or dismissed.

(19) Delinquent, Dependent and Neglected Children § 111--Delinquent Children--Dispositions--Commitment--Qualifying Offenses.--The juvenile court had authority to dismiss a *Welf. & Inst. Code*, § 602 petition. Dismissal of the petition, for the purpose of allowing a Department of Corrections and Rehabilitation, Division of Juvenile Facilities commitment on the minor's previously sustained § 602 petition, was not precluded by statute. A dismissal for this purpose is appropriate under *Welf. &*

*Inst. Code*, § 782, so long as the juvenile court, in its discretion, finds that the dismissal is required by the interests of justice and the welfare of the minor.

[Erwin et al., Cal. Criminal Defense Practice (2012) ch. 124, § 124.23; 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 951.]

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JUDGES: Opinion by Corrigan, J., with Baxter, J., Werdegar, and Chin, JJ., concurring. Dissenting opinion by Cantil-Sekauye, C. J., with Kennard, J., and Liu, J., concurring.

OPINION BY: Corrigan [\*400]

OPINION

[\*\*1162] [\*\*\*275] CORRIGAN, J.--This case involves the interplay between two statutes governing juvenile delinquency dispositions. *Welfare and Institutions Code* section 733, subdivision (c) (section 733(c))<sup>1</sup> establishes a general rule that a ward cannot be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF), unless "the most recent offense alleged in any petition and admitted or found to be true by the court" (italics added) is one of the violent offenses listed in section 707, subdivision (b) (section 707(b)). On the other hand, section 782 provides that the juvenile court has the power to dismiss any wardship petition if "the interests of justice and the welfare of the minor require such dismissal ... ."

1 All unspecified statutory references are to the *Welfare and Institutions Code*.

These two provisions may both come into play when

a ward on probation for a DJF-eligible offense commits a new offense that is not listed in *section 707(b)*. If the prosecution files a notice of a probation violation under *section 777* (777 notice), the court has the power to revoke the ward's probation and commit the ward to DJF. However, if the prosecution files a new *section 602* petition (602 petition), the plain language of *section 733(c)* will prohibit the court from ordering a DJF commitment if the allegation is admitted or found true because the new offense is the "most recent offense alleged in any petition" and is not DJF eligible. The question arises whether, under these circumstances, the juvenile court may use its broad discretion under *section 782* to dismiss the second petition so that the matter can be treated as a probation violation, allowing the ward to be committed to DJF. Based on the plain language of the statutes, legislative history, and the policies served by the juvenile court law, we conclude the court has that discretion.

#### [\*\*1163] I. BACKGROUND

##### A. September 2008 Assault on Joseph C.

On September 16, 2008, 11-year-old Joseph C. was riding his bicycle in Santa Rosa when a car stopped next to him. The minor, Greg F., and two other boys jumped out, yelling Norteño gang slogans and displaying gang hand signs. The minor hit Joseph on the head with a baseball bat, knocking him off his bicycle. The minor tried to take the bicycle, but Joseph clung to it. Joseph was airlifted to the hospital and underwent surgery. He was hospitalized for seven days and suffered lingering neurological damage.

The ensuing 602 petition alleged the minor had committed assault with a deadly weapon and by means of force likely to produce great bodily injury [\*401] (*Pen. Code, § 245, subd. (a)(1)*), had personally inflicted great bodily injury (*Pen. Code, § 12022.7, subd. (a)*), and had acted for the benefit of a criminal street gang (*Pen. Code, § 186.22, subd. (b)(1)(C)*). The minor admitted each of the allegations, and the petition was sustained. Because "[a]ssault [\*\*\*276] by any means of force likely to produce great bodily injury" is one of the offenses listed in *section 707(b)*, the minor was eligible for a DJF commitment. (*§ 707(b)(14)*; see *§ 733(c)*.) The maximum term was 17 years.

The probation department unanimously recommended a commitment to DJF based on "the

minor's callous act of violence upon a young victim, who continues to be emotionally and physically [a]ffected by the minor's actions, the minor's lack of remorse for the victim, and the risk he poses to the community." Due to the severity of his offense, the minor was not considered a suitable candidate for the department's placement services. Moreover, the department believed DJF could best provide him with "appropriate and necessary treatment and rehabilitation services." The juvenile court declared the minor a ward of the court but rejected the probation department's recommended disposition and instead ordered an out-of-home placement. This placement was terminated after five months because the minor refused to participate in treatment. Staff voiced concern over the minor's entrenched gang involvement and lack of empathy for his victim. On June 11, 2009, the minor was detained in juvenile hall pending identification of another suitable placement.

##### B. August 2009 Battery in Juvenile Hall

On August 16, 2009, during dinner at the juvenile hall, the minor and two other Norteño gang members suddenly stood up and attacked three Sureño gang members sitting nearby. Punches were exchanged. Juvenile hall staff members were initially unable to break up the fight.

The district attorney filed a new 602 petition on August 18, 2009, alleging the minor had committed two offenses: (1) battery for the benefit of a gang (*Pen. Code, §§ 186.22, subd. (d), 242*) and (2) knowing participation in a gang (*Pen. Code, § 186.22, subd. (a)*). Neither offense is "described in subdivision (b) of Section 707." (*§ 733(c)*.) At the detention hearing the next morning, the minor admitted the battery offense and associated gang enhancement. In return, the district attorney dismissed the gang participation count. The juvenile court accepted the admission and set the matter for a disposition hearing.

Three days later, with the probation officer's concurrence, the district attorney filed an ex parte request to calendar a motion to "withdraw" the minor's plea. The following Monday, the prosecutor filed a notice of probation violation under *section 777*, based on the assault in juvenile hall. The [\*402] prosecutor admitted having filed the 602 petition in error, rather than proceeding by way of a probation violation. He asked the court to withdraw the minor's plea and strike the petition, explaining that the prosecution was "trying to get to a [DJF-eligible] offense" related to the prior petition

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because of the probation department's concerns. In particular, he noted, "there aren't any placements that are willing to accept Greg and we don't have anywhere to put him." With the court's permission, the prosecutor filed a formal motion to set aside the minor's admission and dismiss the August 18, 2009 petition. After full briefing and argument, the court granted the motion, dismissing the August 18, 2009 petition in the interests of justice and the [\*1164] minor's welfare. (§ 782.) The court explained that it dismissed the new 602 petition to create the "best options" for disposition.

The minor subsequently admitted the section 777 probation violation. The court referred the matter to probation for an updated recommendation on disposition. The matter was continued several times to [\*\*\*277] determine whether the minor could be successful in juvenile hall or in another placement short of DJF. When the disposition hearing was held on February 3, 2010, the probation officer reported that the minor had been involved in yet another assault on a rival gang member in juvenile hall. Moreover, in light of his gang involvement and violent behavior in juvenile hall, none of the placement programs the probation officer had contacted were willing to accept the minor. The court committed the minor to DJF and set the maximum term of confinement at 17 years.

This dispositional order was reversed on appeal. The Court of Appeal held that section 733(c) limits a juvenile court's authority to dismiss a petition under section 782, and the court could not commit the minor to DJF based on the August 18, 2009 petition. In reaching that conclusion, the appellate court agreed with *V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455 [93 Cal. Rptr. 3d 851] (V.C.) and rejected the contrary reasoning in *In re J.L.* (2008) 168 Cal.App.4th 43 [35 Cal. Rptr. 3d 35] (J.L.). We granted review to resolve the conflicting case law. We now hold that section 733(c) does not deprive the juvenile court of its discretion to dismiss a 602 petition and commit a ward to DJF when, in compliance with section 782, such a dismissal is in the interests of justice and for the benefit of the minor.

## II. DISCUSSION

The minor argues the juvenile court lacked authority to dismiss his 602 petition for two reasons. First, he asserts the limitation on DJF commitments in section 733(c) is a more specific, later-enacted statute that overrides section 782. Second, he contends section 782

may only be used to terminate jurisdiction over a minor. Because the dismissal here was used to "reach" [\*403] back" to an earlier petition and commit an otherwise ineligible ward to DJF, the minor claims the dismissal was not "in the interests of justice," as required by section 782. We reject both of these arguments.

### A. Summary of Juvenile Delinquency Proceedings

[HN1] (1) Although juvenile delinquency proceedings have been called "quasi-criminal" (*Joe Z. v. Superior Court* (1970) 3 Cal.3d 797, 801 [91 Cal. Rptr. 594, 478 P.2d 265]), we have also observed that they are "fundamentally different" from adult criminal proceedings" and require "that a 'balance' be struck between the 'informality' and 'flexibility' " necessary in juvenile proceedings and attention to the juvenile's constitutional rights. (*Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1215 [26 Cal. Rptr. 2d 623, 865 P.2d 567].) One important difference between juvenile delinquency and adult criminal proceedings is the speed with which juvenile proceedings must begin and progress. (See *id.* at p. 1216.) Much must be completed in a narrow timeframe.

(2) When there is reasonable cause to believe a minor has violated a law defining a crime, law enforcement may take the minor into temporary custody. (§§ 602, subd. (a), 625, subd. (a).) If the minor is detained, law enforcement must deliver the minor "without unnecessary delay" to the probation officer in an appropriate county (§§ 626, subd. (d), 626.5, subd. (b)) and provide the probation officer with incident reports (§§ 626, subd. (c), 626.5, subd. (a)). [HN2] The probation officer must "immediately investigate the circumstances of the minor and the facts surrounding his or her being taken into custody" and determine if continued detention is necessary. (§ 628, subd. (a); see § 628.1.) If the probation officer determines that the minor is already a ward of the juvenile court, the [\*\*\*278] officer can file a 777 notice. (§ 777, subds. (a), (b).) If the minor is not a ward and the probation officer determines that delinquency proceedings should be initiated, the officer refers the matter to a prosecuting attorney for the filing of a 602 petition. (§§ 630, 650, 653.5, subd. (b).) [\*1165]

If a 777 notice or 602 petition is not filed within 48 hours (excluding noncourt days) after the minor was taken into custody, the minor must be released. (§ 631, subd. (a); *In re Daniel M.* (1995) 47 Cal.App.4th 1151, 1154-1155 [55 Cal. Rptr. 2d 17]; *Cal. Rules of Court*,

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rule 5.752(b).) A detention hearing must be held by the next judicial day after a petition or notice is filed. (§ 632, *subd. (a)*.) At the detention hearing, the court reviews the probation officer's report to determine whether continued detention of the minor is necessary. (§ 636; *Cal. Rules of Court, rule 5.760*.)

[HN3] (3) The next step following a 602 petition is the jurisdictional hearing, at which the court decides whether a crime has been committed. (§ 701.) [\*404] Offenses alleged in the 602 petition must be proven true "beyond a reasonable doubt" and be "supported by evidence ... legally admissible in the trial of criminal cases." (§ 701; *accord, In re Eddie M.* (2003) 31 Cal.4th 480, 487 [3 Cal. Rptr. 3d 119, 73 P.3d 1115].) If the minor is detained, the jurisdictional hearing must be held within 15 judicial days after the detention order. (§ 657, *subd. (a)(1)*.) As in this case, the minor may admit the allegations in the 602 petition at the detention hearing and waive further jurisdictional proceedings. (§ 657, *subd. (b)*.)

[HN4] (4) Once jurisdiction on a 602 petition is established, the case proceeds to a dispositional hearing. At this hearing, the court considers the probation officer's social study and other evidence to determine an appropriate disposition. (§ 706.) In reaching a disposition, the court considers (1) the minor's age, (2) the circumstances and gravity of the offense, and (3) the minor's previous delinquent history. (§ 725.5.) The court may place the minor on probation, with or without declaring the minor a ward of the court, or it may declare the minor a ward and order appropriate treatment and placement. (§§ 725, 726.) Placement options include the home of a relative or extended family member; a suitable licensed community care facility or foster home; juvenile hall; a ranch, camp or forestry camp; and, the most restrictive setting, DJF. (§§ 727, *subd. (a)*, 730, *subd. (a)*, 731, *subd. (a)(4)*.) The court can also set aside the jurisdictional findings and dismiss the petition if it finds that the interests of justice and the welfare of the minor require a dismissal, or if it finds that the minor is not in need of treatment or rehabilitation. (§ 782.)

#### B. Section 733(c) Does Not Deprive the Court of Its Discretion Under Section 782

[HN5] (5) Section 733(c)'s commitment limitation provides that a juvenile ward may not be committed to DJF if "[t]he ward has been or is adjudged a ward of the court pursuant to Section 602, and the most recent offense

alleged in any petition and admitted or found to be true by the court is not described in *subdivision (b) of Section 707* [(violent felony offenses)] or *subdivision (c) of Section 290.008 of the Penal Code* [(sex offenses)]." Thus, a DJF commitment must be based on a recent violent offense or sex crime adjudicated in a delinquency petition. It cannot be ordered based on a past offense in the ward's juvenile record if the ward's most recent offense does not qualify.

[HN6] (6) Because section 733(c)'s commitment limitation depends on the nature of "the most recent offense alleged in any petition" (italics added), the statute does [\*279] not bar DJF commitments imposed for probation violations on qualifying offenses. (*In re D.J.* (2010) 185 Cal.App.4th 278, 286 [110 Cal. Rptr. 3d 261]; *In re M.B.* (2009) 174 Cal.App.4th 1472, 1476 [95 [\*405] Cal. Rptr. 3d 359]; *J.L., supra*, 163 Cal.App.4th at p. 60.) When the voters enacted Proposition 21 in 2000, they replaced the supplemental petition procedure formerly used under section 777 with a notice provision. (*In re Eddie M., supra*, 31 Cal.4th at pp. 489, 491.) Thus, a probation violation procedure is initiated under section 777 by the filing of a notice, not a petition. (*J.L., at pp. 58-59*.) Significantly, a probation violation proceeding involves a different standard of proof than a section 602 proceeding, and it does not result in the charging or adjudication of a criminal offense, even if the conduct alleged is criminal. (*In re Eddie M., at p. 506; J.L., at pp. 59-60*.) Moreover, if a [\*1166] violation is established, the most restrictive placement the court can impose is the maximum term of confinement on the original offense for which the ward was placed on probation. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 165 [14 Cal. Rptr. 3d 261, 91 P.3d 205].)

In June 2009, Greg F. was placed on probation and detained in juvenile hall. The maximum term of confinement for his violent, gang-motivated assault on Joseph C. was 17 years. Just two months later, the minor committed a second, although less violent, assault on rival gang members in juvenile hall. This second offense could have been alleged in a 777 notice and treated as a probation violation. Had the district attorney followed this course, the minor does not dispute that he could have been committed to DJF for up to 17 years as punishment for the original offense. If a ward's most recent offense is alleged in a 777 notice, as opposed to a 602 petition, section 733(c) does not apply. However, the prosecutor mistakenly brought the minor's new offense before the

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court in a 602 petition rather than a 777 notice. The question now is whether the trial court had discretion to dismiss the 602 petition, after the minor had admitted the non-DJF-eligible offense there alleged, and treat the matter as a probation violation.

"Juvenile courts have long had the authority to dismiss juvenile matters at the disposition stage of proceedings. (*In re W.R.W.* (1971) 17 Cal. App. 3d 1029, 1036 [95 Cal. Rptr. 354].) Such authority was statutorily expressed between 1915 and 1961. (*Ibid.*) When the entire juvenile court law was repealed and recodified in 1961, without enactment of a general dismissal provision, the reviewing court in *In re W.R.W.* concluded juvenile courts nevertheless properly continued the practice of exercising discretion to dismiss juvenile matters. (*Ibid.*) It noted: 'The [juvenile] court is accorded great discretion in its disposition of juvenile matters. It may at any time modify or vacate a dispositional order and may entirely terminate its jurisdiction when it is satisfied that further supervision is unnecessary [citations]. It would be inconsistent with the liberal termination provisions and the general thrust of the juvenile court law to hold that the referee, at the time of original disposition, could not dismiss the case if he felt that court supervision would be unnecessary and perhaps harmful.' (*Id.* at p. 1037, fn. omitted.) Shortly after the decision in *In re W.R.W.*, 'the Legislature drafted section 782, [\*406] restoring to the juvenile law the clear power of the court to dismiss juvenile petitions in the interests of justice.' (*Derek L. v. Superior Court* (1982) 137 Cal. App. 3d 228, 232 [186 Cal. Rptr. 870] ... )' (*V.C.*, *supra*, 173 Cal.App.4th [\*\*\*280] at pp. 1463-1464, fn. omitted.)

Section 782 describes the juvenile court's discretion to dismiss delinquency petitions. It states, in relevant part: [HN7] "A judge of the juvenile court in which a petition was filed, at any time before the minor reaches the age of 21 years, may dismiss the petition or may set aside the findings and dismiss the petition if the court finds that the interests of justice and the welfare of the minor require such dismissal, or if it finds that the minor is not in need of treatment or rehabilitation." (§ 782.)

(7) Determining whether the commitment limitation of section 733(c) prevails over the dismissal discretion granted by section 782 requires analysis of these statutes in accordance with long-standing principles of interpretation. [HN8] Our fundamental task in construing a statute "is to ascertain the Legislature's intent [and]

effectuate the law's purpose. [Citation.] We begin our inquiry by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] In doing so, however, we do not consider the statutory language 'in isolation.' [Citation.] Rather, we look to 'the entire substance of the statute ... in order to determine the scope and purpose of the provision ... . [Citation.]" [Citation.] That is, we construe the words in question "in context, keeping in mind the nature and obvious purpose of the statute ... ." [Citation.]" [Citation.] We must harmonize 'the various parts of a statutory enactment ... by considering the particular clause or section in the context of the statutory framework as a whole.' [Citations.] We must also avoid a construction that would produce absurd consequences, which we presume [\*1167] the Legislature did not intend. [Citations.]" (*People v. Mendoza* (2000) 23 Cal.4th 896, 907-908 [98 Cal. Rptr. 2d 431, 4 P.3d 265].)

#### 1. Statutory Language

(8) Nothing in the language of section 733 indicates that the Legislature intended this provision to override the juvenile court's discretion to dismiss a petition when dismissal is in the interests of justice and for the welfare of the minor. (§ 782.) Section 733(c) does not mention section 782, nor does it state that its provisions prevail over section 782, or any other law. [HN9] When the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like "notwithstanding any other law" or "notwithstanding other provisions of law." (See *Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 995 [91 Cal. Rptr. 3d 792]; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 386 [\*407] [36 Cal. Rptr. 3d 31].) The Legislature did not include this language in section 733(c), nor did it amend section 782 to prohibit dismissals to permit a DJF commitment.

(9) The absence of such an express limitation on the juvenile court's power under section 782 is significant. [HN10] The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute. (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 779, fn. 3 [35 Cal. Rptr. 2d 814, 884 P.2d 645]; *In re Michael G.* (1988) 44 Cal.3d 283, 293 [243 Cal. Rptr. 224, 747 P.2d 1152].) "The failure of the Legislature to change the law in a particular respect when the subject is generally before it

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and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended." [Citations.]" (*Estate of McDill* (1975) 14 Cal.3d 831, 837-838 [122 Cal. Rptr. 754, 537 P.2d 874].) For over 40 years, section 782 [\*\*\*281] has given juvenile courts the power to dismiss a delinquency petition if doing so serves the interests of justice and the welfare of the minor. (Stats. 1971, ch. 607, § 1, p. 1211.) If the Legislature had intended to deprive courts of this long-held discretionary power when a dismissal would conflict with section 733(c), it could have easily made this intent plain. It did not.

(10) The minor argues that section 733(c) must prevail over section 782 because it is the more specific and later-enacted statute. However, this argument has two flaws. First, even under his reading of the statute, the minor concedes that a limitation on discretion must be implied. Section 733(c) is not more specific than section 782 on this point. Indeed, it does not mention a limit on section 782 discretion at all. [HN11] "An implied amendment is an act that creates an addition, omission, modification or substitution and changes the scope or effect of an existing statute." [Citation.] Amendments by implication are disfavored and should be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such as where they are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. ..." [Citation.] [Citation.]" (*In re Sean W.* (2005) 127 Cal.App.4th 1177, 1187 [26 Cal. Rptr. 3d 248].) Second, the two provisions are not irreconcilably in conflict. (11) As we have noted, [HN12] "[t]he principle that a specific statute prevails over a general one applies only when the two sections cannot be reconciled. [Citations.] [Citation.] If we can reasonably harmonize '[t]wo statutes dealing with the same subject,' then we must give 'concurrent effect' to both, 'even though one is specific and the other general. [Citations.]" [Citation.]" (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478 [66 Cal. Rptr. 2d 319, 940 P.2d 906].) "[t]he courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together." [Citations.]" (*In re Gladys R.* (1970) 1 Cal.3d 855, 863 [83 Cal.Rptr. 671, 464 P.2d 127].) [\*408]

Sections 733(c) and 782 can be harmonized. Section 733(c) prohibits a commitment to DJF unless the minor's most recent offense alleged in a petition is of a particular

class. If the juvenile court exercises its discretion under section 782 to dismiss a 602 petition, its decision does not nullify or abrogate section 733(c). It simply changes the [\*1168] "most recent offense alleged in any petition" to which section 733(c) applies in that particular case. In a great many cases, the minor's DJF eligibility will be based on the most recent offense alleged in a new 602 petition, in accordance with section 733(c). However, if the minor has been given an opportunity to benefit from probation after committing a DJF-eligible offense, and then goes on to commit a new offense while on probation, the interests of justice and the welfare of the minor may be best served by a DJF commitment. Section 782 gives the juvenile court a discretionary tool in such cases to control the operative petition for purposes of section 733(c) and, consequently, expand its dispositional options. Allowing section 782 dismissals in the interests of justice and for the minor's welfare thus gives effect to both statutes.

Nor would allowing discretionary dismissals under section 782 frustrate the legislative purposes behind section 733(c). Section 733(c) simply provides that a minor may not be committed to DJF if the most recent offense admitted and found true following a 602 petition is not a qualifying offense. It cannot be ordered based on a past offense in the minor's juvenile record if the minor's recent offenses are nonviolent. As noted, however, because section 733(c) [\*\*\*282] speaks to conduct alleged in a "petition," it does not prohibit the court from ordering DJF commitments for probation violations on qualifying offenses. (*In re D.J.*, *supra*, 185 Cal.App.4th at p. 286; *In re M.B.*, *supra*, 174 Cal.App.4th at p. 1476; *J.L.*, *supra*, 168 Cal.App.4th at p. 60.) Having granted the minor leniency by placing him on probation for a DJF-qualifying offense, the court retains discretion to impose a DJF commitment if the minor violates that probation. The availability of that option provides an important incentive for the minor to reform.

## 2. Legislative History

Construed in light of standard principles of interpretation, the meaning of section 733(c) is clear, and there is no need to resort to legislative history. (See *Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1063 [116 Cal. Rptr. 3d 530, 239 P.3d 1228].) We have examined the legislative history underlying section 733(c), however, and found nothing to suggest that the Legislature [\*409] intended to deprive juvenile courts of

their long-standing discretion to dismiss delinquency petitions when appropriate.<sup>2</sup>

2 At the People's request, we have taken judicial notice of the legislative histories surrounding the enactment of sections 733 and 782. At the minor's request, we have also taken judicial notice of legislative history materials concerning a predecessor to the bill that enacted section 782. (See *post*, fn. 5.)

Section 733(c) was enacted as part of the 2007 realignment legislation. (*In re N.D.* (2008) 167 Cal.App.4th 885, 892 [84 Cal. Rptr. 3d 517]; *V.C.*, *supra*, 173 Cal.App.4th at pp. 1468-1469.) The overarching purpose of Senate Bill No. 81 (2007-2008 Reg. Sess.), which added section 733, was to make "necessary statutory changes to implement the Budget Act of 2007." (Stats. 2007, ch. 175, § 38, p. 2105.) A report of California's Little Hoover Commission explains the history behind these budgetary measures: "To settle a lawsuit brought on behalf of inmates of state juvenile facilities, the state entered into a consent decree in November of 2004. The cost of compliance with the consent decree proved to be high: 'Realizing the state could not afford to comply with the ... consent decree, in 2007, policy-makers acted to reduce the number of youth offenders housed in state facilities by enacting realignment legislation which shifted responsibility to the counties for all but the most serious youth offenders. ...' (Little Hoover Com., Juvenile Justice Reform: Realigning Responsibilities (July 2008) pp. i-ii <[http://www.lhc.ca.gov/lhcdir/192/report 192.pdf](http://www.lhc.ca.gov/lhcdir/192/report%20192.pdf)> ... .)" (*In re N.D.*, at pp. 891-892.)

One aspect of Senate Bill No. 81 (2007-2008 Reg. Sess.) was to "stop the intake [to DJF] of youthful offenders adjudicated for non-violent, non-serious offenses (non-707b offenses) ... ." (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended July 19, 2007, p. 2.) In the first budget year, this change was projected [\*1169] to reduce the average daily population in state juvenile institutions by 199 offenders and the average daily population on parole by 190 parolees. (*Id.* at p. 3.) "By transferring responsibility for some wards to county authorities, the state saved about \$ 250,000 per ward per year. [Citation.] At the same time, the legislation compensated the counties for the additional wards for which they would be responsible

under a formula based on a rate of \$ 117,000 per ward per year. [Citations.]" (*In re N.D.*, *supra*, 167 Cal.App.4th at p. 892.) In addition to these budgetary concerns, this realignment legislation responded to findings. [\*\*\*283] that better results could be obtained at the local level for nonviolent juvenile offenders. An argument in support of Senate Bill No. 81 stated: "Quite simply most counties do it better and for less cost. The offenders that will be diverted are non-serious, non-violent, [\*410] non[-]sex offender[] wards who likely can be better served in their communities closer to their existing support systems." (Sen. Republican Fiscal Off., Analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended Apr. 19, 2007, p. 2.)

Section 733(c)'s limitation on juvenile offenders eligible for a DJF commitment was "motivated by a desire to reduce the cost and increase the effectiveness of juvenile confinement." (*In re N.D.*, *supra*, 167 Cal.App.4th at p. 892.) The legislative history consistently stresses that only wards who are *not* currently violent will be diverted from state to local responsibility. There is no indication the Legislature ever considered the situation before us, in which an offender who is on probation for a recent serious and violent offense is brought before the juvenile court on a new petition alleging a non-DJF-eligible offense. However, it is clear that the Legislature intended to preserve the possibility of DJF commitments for violent offenders and sex offenders. In keeping with this clear legislative intent, it is not reasonable to interpret the realignment legislation as restricting the juvenile court's ability to order an appropriate disposition for such offenders. Nothing in the legislative history surrounding the enactment of section 733(c) suggests the Legislature intended to strip juvenile courts of their long-held discretion to dismiss a delinquency petition when dismissal is in the interests of justice and for the minor's welfare. "We are not persuaded the Legislature would have silently, or at best obscurely, decided so important ... a public policy matter and created a significant departure from the existing law." (*In re Christian S.* (1994) 7 Cal.4th 768, 782 [30 Cal. Rptr. 2d 33, 872 P.2d 574].)

### 3. Policy Considerations

(12) The interpretation we adopt also avoids absurd and unreasonable consequences. [HN13] In interpreting a statute, courts are obligated to "adopt a common sense construction over one leading to mischief or absurdity." (

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*In re Samano* (1995) 31 Cal.App.4th 984, 989 [37 Cal. Rptr. 2d 491].)

The minor complains that juvenile courts should not be able to circumvent section 733(c)'s restrictions on DJF eligibility by using a dismissal to "reach back" to an earlier delinquency petition. But section 782 can only be used to "reach back" and commit a minor to DJF if the minor is currently on probation for a DJF-eligible offense. Under these circumstances, no one disputes that if the prosecution files a 777 notice alleging a probation violation, the juvenile court can commit the minor to DJF as punishment for the original section 707(b) offense. (See *In re D.J.*, *supra*, 185 Cal.App.4th at p. 286, J.L., *supra*, 168 Cal.App.4th at p. 60.) However, if the prosecution alleges the new offense in a 602 petition instead of a 777 notice, a commitment to DJF is potentially foreclosed because the new 602 petition [\*411] becomes the relevant petition for determining the minor's "most recent offense alleged in any petition" for purposes of section 733(c). If the minor admits the non-707(b) offense before the prosecution reconsiders its decision, or has a chance to dismiss the 602 petition on its own motion, the plain language of section 733(c) prohibits the juvenile court from committing the minor to DJF.

It is evident, then, that the situation we are addressing often arises because the [\*\*\*284] prosecution has simply filed the wrong piece of paper: a 602 petition instead of a 777 notice. [\*\*\*1170] Although not to be encouraged, occasional oversights such as this understandably occur given the unusually short deadlines in juvenile delinquency matters. As discussed, a 602 petition or a 777 notice must be filed within 48 hours after a minor has been taken into custody, and a detention hearing must be held the next judicial day. (§§ 631, *subd.* (a), 632, *subds.* (a), (c).) A jurisdictional hearing is required within the next 15 judicial days: (§ 657, *subd.* (a)(1).) These strict deadlines leave the prosecution and probation department very little time to investigate the minor's criminal history before the current allegations are adjudicated or the minor has an opportunity to admit them. A minor can admit the allegations in a 602 petition at the detention hearing, which typically occurs just three days after he has been taken into custody.

Nothing in the language or legislative history of section 733 suggests the Legislature meant to deprive juvenile courts of the ability to impose DJF commitments

when revoking probation for DJF-eligible offenses. Yet, the minor's interpretation would produce exactly that absurd result if the prosecution mistakenly alleges the latest offense in a 602 petition instead of a 777 notice. It would immunize from DJF commitment a minor who quickly admits new misconduct alleged in a 602 petition even if the minor remained eligible for DJF under the terms of probation on a prior offense. Two minors on probation for the same DJF-eligible offense who later committed the same non-section-707(b) conduct would be subject to very different dispositions depending on which form of pleading was filed.

[HN14] (13) The statutory scheme governing juvenile delinquency is designed to give the court "maximum flexibility to craft suitable orders aimed at rehabilitating the particular ward before it." (*In re Antoine D.* (2006) 137 Cal.App.4th 1314, 1323 [40 Cal. Rptr. 3d 885].) Flexibility is the hallmark of juvenile court law, in both delinquency and dependency interventions. (*In re James R.* (2007) 153 Cal.App.4th 413, 432 [62 Cal. Rptr. 3d 824].) As noted, the juvenile court has long enjoyed great discretion in the disposition of juvenile matters (*In re W.R.W.*, *supra*, 17 Cal. App. 3d at p. 1037), and that discretion is codified in section 782. To interpret section 733(c) as cutting off the juvenile court's broad discretion to order an appropriate disposition, simply because [\*\*\*412] the wrong document was filed, would elevate form over substance and create an absurd result the Legislature could not have intended. When a DJF commitment for a section 707(b) offense for which probation was ordered serves the interests of justice and the welfare of the minor, the juvenile court has discretion to dismiss a new 602 petition to permit treatment of the matter as a probation violation.

The dissent agrees that section 733(c) does not restrict a juvenile court's power to dismiss a 602 petition before jurisdictional findings have been made. Once an allegation of a non-DJF-eligible offense has been admitted or found true, however, the dissent would hold section 733(c) strips the court of discretion to dismiss the petition in whole or in part. (Dis. opn., *post*, at p. 423.) But, as noted, a minor can admit allegations of a 602 petition at the detention hearing, which must be held the next judicial day after the petition is filed. (§ 632, *subd.* (a).) There is no indication the Legislature intended to limit the juvenile court's dispositional options irrevocably so early in the proceedings. The dissent's interpretation of section 733(c) could have [\*\*\*285] the perverse effect

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of discouraging the early resolution of delinquency matters. If, by accepting an admission at the outset of the case, the juvenile court stands to lose its discretion under section 782, courts may be loath to accept such early pleas.

The dissent's interpretation could also reward gamesmanship in the context of multicount petitions. If a minor commits a series of criminal offenses and all are alleged in the same 602 petition, there is an argument that section 733(c) prohibits commitment to DJF unless the last offense committed is one listed in section 707(b) or Penal Code section 290.008, subdivision (c). Although section 733(c) premises eligibility for DJF on the nature of "the most recent offense alleged in any petition," focusing on the most recently committed offense could lead to arbitrary [\*1171] and potentially absurd results in a multicount case. A minor who commits a string of violent acts would be immunized from a DJF commitment if the crime spree happened to end with a nonqualifying offense. An arguably more sensible interpretation of section 733(c) would require simply that an offense alleged in the most recent petition, and admitted or found true, be listed in section 707(b) or Penal Code section 290.008, subdivision (c).<sup>3</sup>

3 We need not, and do not, resolve this controversy here. We note, however, that focusing on the most recent petition, and not the most recent offense described in a multicount petition, would appear to avoid absurd consequences and remain consistent with the Legislature's intent to reserve DJF commitments for specific recent offenses.

Assuming that DJF eligibility turns on the nature of a minor's most recently committed offense, the dissent posits that section 782 gives the court discretion to strike individual counts in a 602 petition to change the "most [\*413] recent" offense alleged into one that is DJF eligible. (Dis. opn., *post*, at p. 423, fn. 2.) "Thus, if a minor committed a crime spree that included DJF-eligible offenses, but the offense committed last in time was a DJF-ineligible offense, the juvenile court might, in an appropriate case, dismiss the allegations regarding the last offense in order to clearly preserve a DJF-dispositional option." (*Ibid.*) The dissent therefore recognizes that section 782 can and sometimes should be used for the purpose of preserving the juvenile court's ability to order a DJF commitment. Nevertheless, in the

dissent's view, the court's discretion to use section 782 for this purpose is completely lost once the allegations in a petition have been admitted or found true. A minor could admit all allegations of a multicount 602 petition at the detention hearing, just one day after the petition was filed, and completely avoid a DJF commitment regardless of the multitude or severity of the offenses, so long as the last offense committed was not DJF eligible. Under the dissent's view, the juvenile court would be powerless to prevent this result. We disagree. If the Legislature had intended to limit the court's discretion to forestall absurd and unjust consequences, we believe it would have made this intent clear. It did not.

Although the dissent concedes that "nothing in the language of [section 733(c)] or its history expressly restricts the court's use of its dismissal authority ...," the dissent expresses concern that under our interpretation "a juvenile court could always avoid the DJF-ineligibility provisions of section 733(c), negating the provisions of such statute and frustrating the legislative purposes of the juvenile justice realignment legislation." (Dis. opn., *post*, at p. 424.) This [\*286] argument ignores the unique context we are addressing. Dismissal of a 602 petition enables the court to order a DJF commitment otherwise prohibited by section 733(c) only for a minor currently on probation for a DJF-eligible offense. If the minor is not on probation, or is on probation for a nonqualifying offense, a section 782 dismissal can have no effect on DJF eligibility. Section 733(c)'s restrictions on DJF eligibility thus have "meaningful[] operat[ion]" in all delinquency cases involving a minor not on probation, or on probation for a nonqualifying offense. (See dis. opn., *post*, at p. 424.)

The dissent's unease that juvenile courts may abuse section 782 to circumvent the legislative goal of realignment also ignores the scrutiny such decisions undergo on appellate review. A juvenile court's decision to dismiss a 602 petition under section 782 must be supported by a statement of "specific reasons" in a minute order. (Cal. Rules of Court, rule 5.790(a)(2)(A); see *In re Juan C.* (1993) 20 Cal.App.4th 748, 752-753 [24 Cal. Rptr. 2d 573].) A section 782 dismissal is also subject to review for abuse of discretion. (See *In re Jesus J.* (1995) 32 Cal.App.4th 1057, 1060 [38 Cal. Rptr. 2d 429].) If the juvenile court's action is arbitrary, or does not [\*414] comport with section 782's requirements that the dismissal serve the interests of justice and the welfare of the minor, it can be reversed on appeal as an abuse of

discretion.

#### 4. Appellate Case Law

Two published appellate decisions have considered the issue before us and reached opposite results.

[\*\*1172] In *J.L.*, *supra*, 168 Cal.App.4th 43, J.L. committed a series of offenses that were adjudicated at various times under 602 petitions and 777 notices. In May 2006, he admitted committing felony theft, unauthorized use of a vehicle, and assault, as alleged in 602 petitions from January and March 2006. (*J.L.*, at p. 49.) In December of the same year, another 602 petition was filed alleging attempted second degree robbery with personal use of a knife. (*J.L.*, at p. 50.) The minor admitted these allegations but was later granted permission to withdraw his admission to the weapon enhancement. (*Id.* at pp. 50-51.) Without the enhancement, the attempted robbery offense was not DJF eligible under section 733(c). Recognizing this problem, at the dispositional hearing the juvenile court dismissed the December 602 petition and ordered J.L. committed to DJF on the March 2006 petition. (*J.L.*, at pp. 52-54.) J.L. challenged this order on appeal, arguing section 733(c) precluded his commitment to DJF because his most recent offense admitted and found true was the attempted robbery alleged in the December 2006 petition. (*J.L.*, at p. 56.) Without analyzing the apparent conflict in the statutes, the Court of Appeal upheld the dispositional order because the juvenile court had dismissed the December 2006 petition under section 782, thus making the DJF-eligible offense alleged in the March 2006 petition the "most recent" offense for purposes of section 733(c). (*J.L.*, at pp. 56-57.)

The Court of Appeal here rejected *J.L.* in favor of the contrary ruling in *V.C.*, *supra*, 173 Cal.App.4th 1455. Although the decision below relied heavily on the reasoning in *V.C.*, that case is distinguishable and does not guide our analysis.

In 2005, V.C. admitted committing felony oral copulation of a minor, an offense listed in section 707(b). He was placed in a youth facility and later moved to another [\*\*\*287] placement with special conditions of probation imposed. (*V.C.*, *supra*, 173 Cal.App.4th at p. 1459.) In November 2007, two months after section 733(c) was enacted and two years after V.C.'s 602 petition was sustained, the district attorney filed another 602 petition alleging V.C. had committed three new sex

offenses. (*V.C.*, at p. 1460.) In a negotiated plea bargain, V.C. admitted a misdemeanor that was not DJF eligible, and the remaining allegations were dismissed. (*Ibid.*) The court again ordered residential treatment, and V.C. was placed accordingly. (*Id.* at p. 1466.) Four [415] months later, in February 2008, the district attorney filed a 777 notice alleging V.C. had violated probation by failing to participate in sex offender treatment and obey the rules in his group home. (*V.C.*, at p. 1460.) At the same time, the district attorney moved to dismiss the November 2007 petition so that, pursuant to section 733(c), the "most recent offense alleged in any petition" would be the 2005 oral copulation offense, which is DJF eligible. (*V.C.*, at p. 1460.) After the juvenile court granted the motion, V.C. petitioned for a writ of mandate. (*Id.* at p. 1461.)

The Court of Appeal first observed that V.C. had a "due process right to the benefit of his plea bargain in the 2007 petition." (*V.C.*, *supra*, 173 Cal.App.4th at p. 1465.) It was not just that V.C. had admitted an allegation in the petition; the district attorney had agreed to the resolution, the juvenile court had ordered a disposition, and V.C. had already entered the placement that the court ordered. (*Id.* at p. 1466.) As the Court of Appeal stressed, V.C.'s "plea agreement was thus a fully executed agreement." (*Ibid.*, italics added.) The court concluded that dismissal of the November 2007 petition was not in the interests of justice, as required by section 782, because V.C. had a constitutional right to the benefit of his completed plea bargain. (*V.C.*, at p. 1467.) The court reasoned: "Allowing a trial court to rescind a plea bargain that has been accepted and fully executed, because it was unaware of a change in the law ... , would clearly introduce unacceptable instability in the practice of plea bargaining. No bargain would ever truly be secure." (*Ibid.*)

[\*\*1173] Although the court went on to analyze the language and history of section 733(c) to "confirm[]" its conclusion, the decision rested primarily on the fact that dismissal of the most recent 602 petition was an attempt to undo an executed plea bargain. (*V.C.*, *supra*, 173 Cal.App.4th at p. 1467.) It would be difficult indeed to conclude that such an action served the interests of justice. The facts of this case are quite different. Just three days after the minor admitted an offense that was not DJF eligible, the prosecution moved to set aside the plea and dismiss the 602 petition. No disposition on the petition had been entered, or even much discussed. Indeed, the court explained that it was dismissing the 602 petition to broaden the range of options for disposition.

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Dismissing a 602 petition after disposition potentially raises a host of constitutional concerns not presented in the case before us. We express no opinion on whether such a dismissal could ever be appropriate. However, we disagree with the V.C. court's holding that section 733(c) must always override the juvenile court's ability to dismiss a delinquency petition under section 782. Accordingly, that portion of *V.C. v. Superior Court*, *supra*, 173 Cal.App.4th 1455, 1467-1469, is disapproved. [\*416]

[\*\*\*288] C. Scope of Juvenile Court's Discretion Under Section 782

Apart from section 733(c), the minor contends dismissal of a 602 petition to permit disposition under an earlier petition is not permissible because section 782 may only be used to terminate jurisdiction. This claim rests on an analogy to *Penal Code* section 1385, the dismissal statute applicable to adult criminal cases, and the legislative history of section 782. Both arguments are unpersuasive.

#### 1. Analogy to Penal Code Section 1385

In terms similar to section 782, *Penal Code* section 1385 grants trial courts the power to dismiss a criminal action "in furtherance of justice." In determining whether a section 782 dismissal is "in the interests of justice" (§ 782), some courts have looked to *Penal Code* section 1385 for guidance. (*V.C.*, *supra*, 173 Cal.App.4th at p. 1465; *Derek L. v. Superior Court*, *supra*, 137 Cal. App. 3d at pp. 233-234.)

In *V.C.*, the Court of Appeal remarked, "it has been said dismissal pursuant to [*Penal Code*] section 1385 'runs only in the immediate favor of a defendant, i.e., by cutting off an action or a part of an action against the defendant.' " (*V.C.*, *supra*, 173 Cal.App.4th at pp. 1464-1465, *fn.* 9, italics added, quoting *People v. Hernandez* (2000) 22 Cal.4th 512, 524 [93 Cal. Rptr. 2d 509, 994 P.2d 354].) Having construed *Penal Code* section 1385 as a statute that operates only to reduce punishment of a criminal defendant, the V.C. majority found it "troubling" that the juvenile court had used its analogous authority under section 782 to impose a more severe sanction. (*V.C.*, at pp. 1464-1465, *fn.* 9.) The starting point of this analysis is faulty, however, because we have never held that a dismissal under *Penal Code* section 1385 can only be entered to benefit the defendant. Immediately after we stated, in a different context, that a

dismissal under *Penal Code* section 1385 runs in the immediate favor of a defendant, we added: "To be sure, as the People point out, dismissal under *Penal Code* section 1385, subdivision (a), need not always be ordered for the benefit of a defendant rather than the prosecution. Thus, a dismissal of criminal charges before trial may be 'designed to enable the prosecution "to obtain further witnesses, to add additional defendants, to plead new facts, or to plead new offenses ... " ' (*People v. Orin* (1975) 13 Cal.3d 937, 946 [120 Cal. Rptr. 65, 533 P.2d 193].)" (*People v. Hernandez*, at p. 524.)

(14) The analogy between section 782 and *Penal Code* section 1385 is also flawed for a more fundamental reason. [HN15] "Juvenile proceedings are conducted not only for the protection of society, but for the protection and benefit of the youth involved." (*Derek L. v. Superior Court*, *supra*, 137 Cal. App. 3d at [\*417] p. 236.) "Juvenile court action thus differs from adult criminal prosecutions where 'a major goal is corrective [\*\*\*1174] confinement of the defendant for the protection of society.' [Citation.] The protective goal of the juvenile proceeding is that 'the child [shall] not become a criminal in later years, but a useful member of society.' [Citation.]" (*In re Ricardo M.* (1975) 52 Cal. App. 3d 744, 749 [125 Cal. Rptr. 291]; see *People v. Arias* (1996) 13 Cal.4th 92, 164 [51 Cal. Rptr. 2d 770, 913 P.2d 980].) In contrast to the more punitive aims of the adult criminal justice system, "the purpose of the juvenile justice system is '(1) to serve the "best interests" of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and "enable him or her to be a law-abiding and productive member of his or her family and community," [\*\*\*289] and (2) to "provide for the protection and safety of the public ... " (§ 202, *subds.* (a), (b) & (d); [citations].)' [Citation.]" (*In re R.O.* (2009) 176 Cal.App.4th 1493, 1500 [98 Cal. Rptr. 3d 738].) To this end, the language of section 782 specifically requires that any dismissal of a delinquency petition serve both "the interests of justice and the welfare of the minor." (§ 782, italics added.) No corresponding concern for the welfare of an adult criminal defendant appears in *Penal Code* section 1385.

[HN16] (15) A DJF commitment is not necessarily contrary to a minor's welfare. The DJF has many rehabilitative programs that can benefit delinquent wards. (See *In re Jonathan T.* (2008) 166 Cal.App.4th 474, 485-486 [82 Cal. Rptr. 3d 753]; *In re Tyrone O.* (1989) 209 Cal. App. 3d 145, 153-154 [257 Cal. Rptr. 134].)

Some wards, like the minor here, may be best served by the structured institutional environment and special programs available only at the DJF. (See, e.g., *In re Donald S.* (1988) 206 Cal. App. 3d 134, 139 [253 Cal. Rptr. 274] [finding it in child's best interest "to receive care, treatment and rehabilitation solely as a ward of the youth authority [(now DJF)]"). In determining a child's best interests, the juvenile court must examine all the relevant circumstances. (See *In re Roger S.* (1992) 4 Cal.App.4th 25, 30-31 [5 Cal. Rptr. 2d 208] ["Although both the family court and the juvenile court focus on the best interests of the child, the juvenile court has a special responsibility to the child as *parens patriae* and must look at the totality of the child's circumstances."].)

juvenile court's ability to send wards to DJF on probation violations would arguably have been greatly restricted.

## 2. Legislative History of Section 782

In a related point, the minor asserts that legislative history demonstrates *section 782* [\*\*\*290] was intended to be used only to end the [\*\*1175] juvenile court's jurisdiction over a minor. Presiding Justice Scotland expressed this view in his concurring opinion in *V.C.*, *supra*, 173 Cal.App.4th at page 1472. Having reviewed the sparse legislative history for *section 782*, we disagree.

*Section 782* was enacted in 1971 with the passage of Senate Bill No. 461 (1971 Reg. Sess.). (Stats. 1971, ch. 607, § 1, p. 1211.) The bill was intended to "codify[] present practice in many counties." (Assem. Com. on Crim. Justice, Analysis of Sen. Bill No. 461 (1971 Reg. Sess.) p. 1.) The bill offered one important new feature, however. Existing law allowed juvenile courts to dismiss petitions and set aside wardship findings only when the minor was under the jurisdiction of the court. (Cal. Youth Authority Com., Enrolled Bill Rep. on Sen. Bill No. 461 (1971 Reg. Sess.) Aug. 10, 1971, p. 1.) An enrolled bill report noted that Senate Bill No. 461 would extend this authority to all cases involving a person under age 21, "regardless of whether the minor is, at the time of dismissal, a ward or dependent of the court." (*Ibid.*) "Some judges have felt that minors have been continued under the jurisdiction of the juvenile court so that the court could take this option of setting aside wardship." (*Ibid.*) The report explained that the bill would give courts latitude "to terminate jurisdiction at an earlier date if the court felt that this was in the best interest of the minor." (*Ibid.*) Consistent with this analysis, the Assembly Committee on Criminal Justice explained that newly enacted *section 782* would allow the juvenile court to "dismiss a petition or set aside a finding even after jurisdiction over the minor has terminated and he is no longer a ward or dependent child of the court." (Assem. Com. on Criminal Justice, New Statutes Affecting the Criminal Law (1971 Reg. Sess.) p. 36.) [\*419]

Read carefully, this legislative history does not show that *section 782* was intended to be used for the limited purpose of terminating the juvenile court's jurisdiction. Rather, because *section 782* extended the juvenile court's power to dismiss petitions and set aside findings to minors who were not presently wards of the court, legislative analyses observed that the courts would be

(16) Leaving aside the welfare of the minor, the dissent contends a dismissal that permits a DJF commitment "cannot be in the interests of justice," as required by *section 782*, because "those interests have already been determined by the Legislature" and expressed in *section 733(c)*. (Dis. opn., *post*, at p. 425.) We conclude instead that [HN17] the realignment policies served by *section 733* are not so unyielding they cannot tolerate occasional exceptions when the severity of a minor's offenses, and the minor's own special needs, call for a disposition that includes DJF. If the Legislature had meant to impose such an absolute prohibition on DJF confinement, it would have removed the court's ability to order a DJF commitment for nonviolent [\*418] probation violations. <sup>4</sup> Moreover, there is no reason to assume juvenile courts will ignore the policies underlying *section 733* when they exercise their discretion to dismiss a 602 petition. In deciding whether a dismissal that would qualify an otherwise ineligible minor for a DJF commitment serves the interests of justice and the minor's welfare, the court must take into account all circumstances relevant to the public's need for safety and the juvenile's need for rehabilitation. Where the minor has previously failed in a series of local programs, or where, as here, no local programs will accept the minor, statewide confinement in the structured setting offered by DJF may decisively outweigh other considerations.

<sup>4</sup> Such a result would have been easy enough to accomplish. If *section 733(c)* had been written to require DJF eligibility for the minor's "most recent offense alleged in a petition or notice," or if the statute had simply tied eligibility to the minor's "most recent offense," without mentioning the court document in which it is alleged, the

free to terminate jurisdiction over minors earlier, without fear of losing this authority.

(17) Although the bill's sponsor described Senate Bill No. 461 (1971 Reg. Sess.) as a measure "authoriz[ing] the judge of a juvenile court to terminate its jurisdiction" when the interests of justice and welfare of the minor require dismissal (Sen. Joseph Kennick, letter to Governor Ronald Reagan (1971 Reg. Sess.) Aug. 12, 1971, Governor's chaptered bill files, ch. 607),<sup>5</sup> nothing in the language of *section 782* or the legislative history suggests that termination of jurisdiction was the *only* outcome the Legislature found permissible. [HN18] Termination of jurisdiction is one logical outcome to expect when the juvenile court dismisses a delinquency petition. The Legislature did not necessarily foreclose other outcomes when it enacted *section 782*, however. If the minor's view were correct, the juvenile [\*\*\*291] court could never dismiss a *602* petition, or set aside findings in such a petition, if it would still retain jurisdiction over the minor based on previous petitions. There is no indication the Legislature intended such a result. On the contrary, *section 782* was meant to codify and expand the juvenile court's discretionary dismissal power.

5 The minor directs us to nearly identical comments by Senator Kennick in regard to a predecessor bill that would have added the same version of *section 782*. (Sen. Bill No. 1221 (1970 Reg. Sess.) Apr. 3, 1970.) However, the senator did not say that a dismissal could *only* be used to terminate the court's jurisdiction. In any event, "[w]e have frequently stated ... that the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation." (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062 [48 Cal. Rptr. 2d 1, 906 P.2d 1057].)

#### D. Conclusion

(18) Since its enactment in 1971, *section 782* has given juvenile courts broad discretion to dismiss delinquency petitions when a dismissal serves the interests of justice and the welfare of the minor. Had the Legislature intended to limit that discretion when it enacted *section 733(c)*, one would have expected it to make this intent plain, either in the language [\*\*1176] of

*section 733(c)* or elsewhere in the statutory scheme. It did not. Moreover, because the Legislature did not amend the law to prohibit minors from being committed to DJF when their probation on a DJF-eligible offense is revoked, it is reasonable to conclude the Legislature continued to find such commitments appropriate, notwithstanding the goals sought to be served by *section 733(c)*. [HN19] [\*420] If a DJF commitment is appropriate in the context of a probation revocation, then it remains appropriate even if the prosecution files a *602* petition that has to be withdrawn or dismissed.

(19) Accordingly, we conclude the juvenile court here had authority to dismiss the *602* petition filed on August 18, 2009. Dismissal of this petition, for the purpose of allowing a DJF commitment on the minor's previously sustained *602* petition, was not precluded by statute, as the Court of Appeal below held. A dismissal for this purpose is appropriate under *section 782* so long as the juvenile court, in its discretion, finds that the dismissal is required by the interests of justice and the welfare of the minor. Because the Court of Appeal determined that the juvenile court lacked authority to dismiss the 2009 petition, it did not reach the minor's claims that insufficient evidence showed he would benefit from a DJF commitment and that the juvenile court erroneously relied on information received outside the proceedings. We shall remand for the Court of Appeal to decide these remaining issues.

#### III. DISPOSITION

The judgment of the Court of Appeal is reversed. The matter is remanded to that court for further proceedings consistent with this opinion.

Baxter, J., Werdegarr, J., and Chin, J., concurred.

DISSENT BY: Cantil-Sakauey

#### DISSENT

CANTIL-SAKAUEY, C. J., Dissenting.--Despite the Legislature's clear provision in *Welfare and Institutions Code section 733, subdivision (c)* (*section 733(c)*)<sup>1</sup> that a juvenile ward is *ineligible* for commitment to the "Department of Corrections and Rehabilitation, Division of Juvenile Facilities" (DJF) when the juvenile ward's "most recent offense alleged in any petition and admitted or found to be true by the court" is not an offense listed in *section 707, subdivision*

(b) (section 707(b)) or one of the sex offenses described in subdivision (c) of Penal Code section 290.008 (Penal Code section 290.008(c)), the majority concludes that a juvenile court retains the discretion to commit such a juvenile ward to the DJF by using its authority under section 782 to dismiss the most recently [\*\*\*292] sustained petition and reach back to the last sustained petition if the minor is DJF eligible under such petition. (§ 731, subd. (a)(4).) I cannot agree. The majority's construction of the statutes does not properly harmonize them. It renders section 733(c) ineffective and essentially meaningless. I, therefore, dissent.

I All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

It has long been and continues to be the law that when a minor is before the juvenile court for disposition based on a section 602 petition, "[section] [\*421] 725.5 and other relevant policies of Juvenile Court Law require that the court consider 'the broadest range of information' in determining how best to rehabilitate a minor and afford them adequate care ...." (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2012) Disposition of Ward, § 3.92[3][a], p. 3-137.) The juvenile court must consider "the safety and protection of the public, and the importance of redressing injuries to victims, and the best interests of the minor" in its deliberations regarding disposition. (§ 202, subd. (d).) "No ward of the juvenile court shall be committed to the [DJF] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he [or she] will be benefited by the reformatory educational discipline or other treatment provided by the [DJF]." (§ 734.) Thus, in all cases a juvenile ward may be committed to the DJF only if such commitment is appropriate under the [\*\*1177] circumstances specific to that individual juvenile offender.

However, in 2007, the Legislature acted to impose further limitations on the discretion of the juvenile court with respect to DJF commitments. Responding to both policy arguments and budgetary constraints (*In re N.D.* (2008) 167 Cal.App.4th 885, 891-892 [84 Cal. Rptr. 3d 517]; Little Hoover Com., Juvenile Justice Reform: Realigning Responsibilities (July 2008) pp. i-ii <<http://www.lhc.ca.gov/studies/192/repot192.html>> [as of Aug. 27, 2012]), the Legislature passed juvenile justice

realignment legislation as part of a budget trailer bill and a subsequent cleanup bill. (Stats. 2007, ch. 175, §§ 19, 22, pp. 2089, 2090; Stats. 2007, ch. 257, § 2, p. 2814.) The legislation expressly restricts the normal dispositional authority of the juvenile court.

Specifically, section 731, subdivision (a)(4) (section 731(a)(4)) provides that DJF commitments are available for only those juveniles who are or have been ordered and adjudged to be wards of the court under section 602. Further, only those juvenile wards who have committed a serious or violent felony offense described in section 707(b) or a sexual offense described in Penal Code section 290.008(c) are eligible for a DJF commitment. (§ 731(a)(4).) And among that class of juvenile offenders, DJF commitment is limited to those juvenile wards whose "most recent offense alleged in any petition and admitted or found to be true by the court" is a serious or violent offense under section 707(b) or a sex offense specified in Penal Code section 290.008(c). (§ 733(c).) In other words, the statutes do not authorize commitment to the DJF in the unrestricted discretion of the juvenile court based on the court's review of the overall delinquent history of a juvenile offender or on whether the minor still may be considered generally a serious, violent or sexual offender dangerous to the community for whom DJF commitment is appropriate. (*V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455, 1468 [93 Cal. Rptr. 3d 851] (V.C.).) Rather, the statutes limit the pool of juvenile [\*422] offenders who may be committed to the DJF to juveniles who are wards of the court based on current section 707(b) or Penal Code section 290.008(c) offenses.

[\*\*\*293] The language of section 733(c) specifically defines those who are considered to have such a current qualifying offense. It provides that a juvenile ward is ineligible for commitment to the DJF when "the most recent offense alleged in any petition and admitted or found to be true by the court" is not one of the DJF-qualifying offenses. (*Ibid.*) As the majority recognizes (maj. opn., ante, at p. 404), the phrase "the most recent offense alleged in any petition" (italics added) logically refers to the allegations of violation pled in a section 602 petition. (*In re M.B.* (2009) 174 Cal.App.4th 1472, 1477-1478 [95 Cal. Rptr. 3d 359]; *In re J.L.* (2008) 168 Cal.App.4th 43, 60 [85 Cal. Rptr. 3d 35]; see *In re D.J.* (2010) 185 Cal.App.4th 278, 286 [110 Cal. Rptr. 3d 261].) The phrase "admitted or found to be true by the court" is most reasonably understood to refer

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to the juvenile court's jurisdictional findings. (§ 733(c); see §§ 657, subd. (b), 701, 702; Cal. Rules of Court, rules 5.774(e), 5.778, 5.780(e)(3).) Read with this understanding, eligibility/ineligibility for DJF commitment under section 733(c) is determined when a minor has admitted committing a criminal offense alleged in a section 602 petition at his or her detention hearing or later, or when the allegation of a criminal offense in a section 602 petition is found true by the juvenile court at the jurisdictional hearing, i.e., when the section 602 petition is sustained. It is at that point that the juvenile court has taken jurisdiction over the minor based on the commission of the criminal offense as charged in the petition and that offense becomes the minor's "most recent offense" for purposes of section 733(c). If that most recent offense does not make the minor ineligible for a DJF commitment under section 733(c) and the minor is eligible for commitment to the DJF under section 731(a)(4), then the juvenile court may exercise its discretion at disposition to adjudge the minor to be a ward of the court, or to continue wardship for a minor who has previously been adjudged a ward of the court and commit the ward to the DJF.

Construing the combination of section 731(a)(4) and section 733(c) in this way furthers [\*1178] the legislative purposes of reducing the number of juvenile offenders committed to costly state-level facilities and keeping all but the most dangerous offenders in appropriate and effective local placements. (*In re N.D.*, supra, 167 Cal.App.4th at pp. 891-892; Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended July 19, 2007, p. 2; Assem. Floor Analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended July 19, 2007, p. 1; see § 1960 ["The Legislature finds and declares that local youthful offender justice programs, including both custodial and noncustodial corrective services, are better suited to provide rehabilitative services for certain youthful offenders than state-operated facilities. Local communities are better [\*423] able than the state to provide these offenders with the programs they require, in closer proximity to their families and communities ... ."].) Requiring DJF commitments to be based on "the" (§ 733(c)), not "a," most recently sustained juvenile petition also encourages, promotes, and rewards a juvenile ward's improvement in behavior even though the juvenile may not have been completely successful in reforming his or her conduct.

In situations where the prosecutor views the juvenile's most recent offense to demonstrate not rehabilitative progress, but a continuation of prior serious behavioral problems for which the juvenile is on probation under a DJF-eligible sustained petition, the prosecutor can file a notice of [\*\*\*294] probation violation under section 777. A notice of probation violation does not trigger the terms of section 733(c). (*In re M.B.*, supra, 174 Cal.App.4th at pp. 1474-1475.) Nor does a violation of probation proceeding improperly circumvent section 733(c). Rather, the Legislature's choice to exclude probation violations that factually involve the commission of DJF-ineligible offenses from section 733(c) reasonably recognizes that in such situations the juvenile court may order a commitment to the DJF based on the prior sustained eligible offense, with the maximum term of confinement correspondingly limited by that offense. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 165 [14 Cal. Rptr. 3d 261, 91 P.3d 205].) Where an extension of the juvenile court's jurisdiction is appropriate, for example, to allow further services and monitoring, a new petition is necessary. The prosecutorial discretion to proceed by either section 777 notice or the filing of a new section 602 petition permits a flexible approach to the individual juvenile's situation and preserves the incentive for a juvenile on probation for a DJF-qualifying offense to reform. (See maj. opn., ante, at p. 408.)

Moreover, where a prosecutor files a section 602 petition alleging a new offense or offenses, but subsequently either the prosecutor or the juvenile court concludes the minor's history demonstrates that proceeding by way of a notice of probation violation is more appropriate and in the best interests of the minor, dismissal of the new section 602 petition, in whole or in part, pursuant to section 782, is not prohibited by section 733(c)—provided the dismissal is ordered prior to entry of jurisdictional findings on the new petition.<sup>2</sup> Until the allegations of the new petition have been admitted or found true, the restrictions of section 733(c) are not triggered.

<sup>2</sup> Such dismissal discretion would extend to the possible striking of individual counts alleging DJF-ineligible offenses. Thus, if a minor committed a crime spree that included DJF-eligible offenses, but the offense committed last in time was a DJF-ineligible offense, the juvenile court might, in an appropriate case,

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dismiss the allegations regarding the last offense in order to clearly preserve a DJF-dispositional option.

I cannot agree, however, with the majority that *section 782* is available after the juvenile court enters jurisdictional findings sustaining a new *section* [\*424] 602 petition alleging a DJF-ineligible offense. Although there is no reference in *section 733(c)*, or its legislative history, to *section 782* and nothing in the language of the statute or its history expressly restricts the court's use of its dismissal authority in this situation, such restriction is necessarily and plainly implied.<sup>3</sup> Otherwise, a [\*1179] juvenile [\*\*\*295] court could always avoid the DJF-ineligibility provisions of *section 733(c)*, negating the provisions of such statute and frustrating the legislative purposes of the juvenile justice realignment legislation.

3 *Section 782* differs from *Penal Code section 1385* in that *section 782* requires a dismissal to be both in "the interests of justice" and that "the welfare of the minor require[s] such dismissal ..." or "that the minor is not in need of treatment or rehabilitation." Nevertheless, with respect to its status as statutory authorization for dismissals and its requirement that a dismissal must be "in furtherance of justice," case law regarding *Penal Code section 1385* may provide useful insight. (See *V.C., supra*, 173 Cal.App.4th at p. 1464; accord, *In re Juan C.* (1993) 20 Cal.App.4th 748, 752 [24 Cal. Rptr. 2d 573]; *Derek L. v. Superior Court* (1982) 137 Cal. App. 3d 228, 233 [186 Cal. Rptr. 870].) Such case law makes it clear that the judicial authority to dismiss a case or strike a sentencing allegation under *Penal Code section 1385* may be eliminated by the Legislature even without an express reference to *section 1385* if there is a clear legislative direction to that effect. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 518-519 [53 Cal. Rptr. 2d 789, 917 P.2d 628]; *People v. Thomas* (1992) 4 Cal.4th 206, 211 [14 Cal. Rptr. 2d 174, 841 P.2d 159]; *People v. Tanner* (1979) 24 Cal.3d 514, 519 [156 Cal. Rptr. 450, 596 P.2d 328].) The same principle should be applicable to *section 782*.

That is, in the situation where the juvenile court would conclude, based on all the information before it, that a DJF commitment should not be ordered for a

juvenile offender, it would be unnecessary for *section 733(c)* to provide that DJF commitment is not permitted. *Section 733(c)* meaningfully operates only in the circumstance where the juvenile court would otherwise be inclined to order a DJF commitment. If, however, the juvenile court has the discretion to dismiss the most recently sustained petition under *section 782* whenever it believes a DJF commitment is appropriate and can be reached by proceeding on a *section 777* notice of probation violation, the very specific language in *section 733(c)* restricting eligibility to "the most recent" sustained petition offense is illusory. The majority's interpretation of the statutes to allow such dismissals violates the fundamental rule of statutory interpretation that presumes every part of a statute has some meaning and effect, as well as the corollary rule requiring us to avoid, if possible, a construction that renders statutory language surplusage. (*People v. Arias* (2008) 45 Cal.4th 169, 180 [85 Cal. Rptr. 3d 1, 195 P.3d 103].)

At a minimum, the majority's construction of the statutes rewrites *section 733(c)* to allow a juvenile court to order a DJF commitment if it finds the juvenile offender has committed and is on probation for "a" recent DJF-qualifying offense. This violates the principle of statutory construction that precludes us from adding or altering statutory language "to accomplish a [\*425] purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [7 Cal. Rptr. 2d 531, 828 P.2d 672].)

Moreover, I believe use of *section 782* in this case is inappropriate for an additional reason. *Section 782* authorizes a dismissal if it is in the interests of justice and required for the welfare of the minor. Both are required and a dismissal is unauthorized if either prong is not met. Through *sections 731(a)(4)* and *733(c)*, the Legislature has determined that the public protection and safety interests of society and the rehabilitative interest of juvenile offenders is best balanced by placement of nonserious or nonviolent juvenile offenders, or those whose offense is nonsexual, at the local level and that a state-level DJF commitment should be reserved for those juvenile offenders who have been currently adjudicated to be serious or violent, or are certain sexual offenders. The use of *section 782* to evade the plain meaning of the restriction in *section 733(c)* cannot be in the interests of justice as those interests have already been determined by the Legislature. (*V.C., supra*, 173 Cal.App.4th at p. 1468.) A dismissal in such a situation must be considered

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unauthorized under *section 782*, which requires a dismissal to be *both* in the interests of justice and required for the welfare of the juvenile.

Nevertheless, the majority concludes that the Legislature intended to retain a juvenile court's authority under *section 782* to dismiss a *section 602* petition even in the narrow situation governed by *section 733(c)*. The majority reasons that such traditional discretion must be preserved to accommodate the narrow time constraints governing juvenile delinquency proceedings, which can hinder [\*1180] informed prosecutorial choices and inappropriately immunize from a DJF commitment a juvenile who [\*\*\*296] quickly admits at his or her detention hearing a new petition containing a DJF-ineligible offense after an earlier sustained petition made him or her DJF eligible. Again, I cannot agree. The statutory timelines for investigating, filing, hearing, and ruling on a juvenile's alleged commission of a criminal offense are not so short as to cause absurd results under a strict construction of *section 733(c)*. Care must simply be taken up front to consider what is most appropriate for each minor; care that is already presumed in the statutory scheme for juvenile delinquency wardship proceedings.

Specifically, probation officers already have a statutory duty to "immediately" investigate the circumstances of a juvenile who is detained based on allegations of the commission of a criminal offense. (§ 628, *subd. (a)*.) Such investigation logically must include a review of the juvenile's history of juvenile court proceedings in order for the probation officer to properly decide whether or not to send an affidavit to the prosecuting attorney recommending commencement of *section 602* proceedings. (§§ 652, 653.5, [\*426] *subds. (b) & (c)*.) And before filing a *section 602* petition alleging a felony offense or as soon as possible after filing, the prosecuting attorney must also review the minor's file to determine if the minor is eligible for deferred entry of judgment under *section 790*. (§§ 628, *subd. (a)*, 790, *subd. (b)*; *Cal. Rules of Court*, rule 5.800(b).) Because a determination of eligibility for deferred entry of judgment depends, in part, on the minor's history of juvenile court proceedings (§ 790, *subd. (a)*), a prosecuting attorney undertaking such investigation will presumably uncover at the same time the information necessary to determine the minor's DJF eligibility. Thus, the statutory scheme contemplates an informed decision by a probation officer and a prosecuting attorney to pursue the matter by filing a

*section 602* petition or by filing a notice of probation violation pursuant to *section 777*.

Moreover, although *section 657, subdivision (b)*, provides that a minor "may" admit the allegations of a *section 602* petition at his or her detention hearing, I am unaware of any authority requiring the juvenile court to accept a proffered admission at that time, particularly in a situation in which the prosecuting attorney or probation officer informs the court that further investigation is necessary. The juvenile court may put over consideration of the acceptance of the minor's admission until the jurisdictional hearing, which must be set within 15 judicial days from the date of the detention order. (§ 657, *subd. (a)(1)*.) And, nothing prevents the court from inquiring of the minor and his or her counsel whether the minor has previously committed a DJF-eligible offense in order for the court to consider the best resolution of the matter.

Thus, it is reasonable to assume that by the time a minor has admitted or been found by the court to have committed a criminal offense alleged in a *section 602* petition, it has been determined by the probation officer, the prosecuting attorney and the juvenile court that it is appropriate for the court to exercise or continue jurisdiction over the minor based on the currently alleged offense or offenses with the concomitant restriction of potential dispositional options.

With guidance from this court regarding the consequences of mistakenly filing and sustaining a new *section 602* petition that alleges DJF-ineligible offenses, probation officers and prosecuting attorneys in the future would be more careful to fully investigate a juvenile's record and not to file a new *section 602* petition alleging DJF-ineligible offenses in situations where the minor is DJF eligible under an earlier [\*\*\*297] sustained petition and where a DJF commitment may be recommended. The probation officer and prosecuting attorney would be more careful to alert the juvenile court to the minor's history of juvenile court proceedings and the court would be more cautious in accepting admission of the jurisdictional allegations of a new *section 602* [\*427] petition alleging DJF-ineligible offenses. Careful prosecutorial investigation and an occasional delay in jurisdictional hearings within the statutorily allotted time to accommodate such investigation would not discourage early resolution of delinquency matters. (See *maj. opn., ante*, at p. 412.) [\*\*\*1181] It would discourage only

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careless filings and inappropriate haste in some small number of proceedings. In any event, the residual possibility of a prosecutorial mistake does not justify ignoring the plain language of *section 733(c)*.

The 2007 legislation, of which *sections 731(a)(4)* and *733(c)* are a part, represents a fundamental shift in policy by the Legislature from treating juvenile offenders at the state level (DJF) to treating the vast majority of juvenile offenders at the local county level. Given the very specific language chosen by the Legislature in *section 733(c)*, I continue to believe an interpretation that limits the juvenile court's discretion better aligns with the Legislature's preference for local commitments. I would apply *sections 731(a)(4)* and *733(c)* according to their

plain terms. I would harmonize *section 782* with these statutes by recognizing that juvenile courts continue to have broad discretion to use their dismissal authority under *section 782* *except* they may not use *section 782* to make a minor who is ineligible for a DJF commitment under *section 733(c)* eligible for such commitment. I would affirm the judgment of the Court of Appeal that concluded the juvenile court's dismissal here was statutorily unauthorized.

Kennard, J., and Liu, J., concurred.

Appellant's petition for a rehearing was denied October 31, 2012. Kennard, J., was of the opinion that the petition should be granted.



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NEW YORK TIMES COMPANY, Petitioner, v. THE SUPERIOR COURT OF  
SANTA BARBARA COUNTY, Respondent; GOLETA WATER DISTRICT, Real  
Party in Interest

No. B045565

Court of Appeal of California, Second Appellate District, Division Six

218 Cal. App. 3d 1579; 268 Cal. Rptr. 21; 1990 Cal. App. LEXIS 282; 17 Media L. Rep.  
1773

March 23, 1990

**DISPOSITION:** [\*\*\*1] Respondent superior court's order of October 6, 1989, denying the motion to disclose public records is annulled and the matter is remanded to the superior court to issue a new order granting petitioner's motion.

## LexisNexis(R) Headnotes

*Administrative Law > Governmental Information > Freedom of Information > General Overview*  
*Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview*  
[HN1] Cal. Gov't. Code § 6258 provides that anyone may institute proceedings for injunctive or declaratory relief to enforce the right to inspect or to receive a copy of any public record.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*  
*Civil Procedure > Remedies > Writs > General Overview*  
*Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review*  
[HN2] Under Cal. Civ. Proc. Code § 6259, an order directing or refusing disclosure is reviewable only by

extraordinary writ of review as defined in § 1067. Grant of writ of review or certiorari under § 1067 is limited only to those cases in which a trial court has exceeded its jurisdiction. §§ 1068, 1074. Where a court conscientiously follows the law but reaches an arguably incorrect conclusion within the exercise of its jurisdiction, there is no basis for annulling its decision by writ of review.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*  
*Civil Procedure > Remedies > Writs > General Overview*  
*Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review*

[HN3] If the trial court acts contrary to the statutory authorized procedure, such as that set forth in Cal. Gov't. Code § 6255, it acts in excess of its jurisdiction and a writ or review, or certiorari, will lie. Section 6255 requires the trial court to weigh the public interest served by nondisclosure against the public interest served by disclosure and determine which interest outweighs the other. The agency seeking to withhold the information has the burden of demonstrating a need for nondisclosure.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*

218 Cal. App. 3d 1579, \*, 268 Cal. Rptr. 21, \*\*,  
1990 Cal. App. LEXIS 282, \*\*\*1; 17 Media L. Rep. 1773

[HN4] *Cal. Gov't. Code* § 6255 permits the governmental agency to withhold records if it can demonstrate that on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record. Thus the burden is on the agency to justify the need for nondisclosure.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*

[HN5] In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A newspaper brought an action under the California Public Records Act (*Gov. Code*, § 6250 *et seq.*) seeking access to the names and addresses of a water district's customers who exceeded their water allocation after implementation of a water rationing ordinance. The newspaper sought a court order that the district disclose the names and addresses of all customers exceeding their allocation during the first period after implementation of the ordinance. The district agreed to provide the names of commercial, agricultural, and multifamily users but not the names and addresses of individual residential customers. The newspaper moved to compel disclosure of the names and addresses of all customers. The superior court placed the burden on the newspaper to justify the public's right to know the names of individual persons and their addresses; it denied the newspaper's motion to compel and ordered disclosure only of the information already provided to the newspaper. The newspaper petitioned for a writ of review.

The Court of Appeal annulled the superior court's order denying the motion to disclose public records and remanded the matter to the superior court to issue a new order granting the newspaper's motion. The court held that the superior court exceeded its jurisdiction in failing to follow the directive of *Gov. Code*, § 6255, to place the burden on the district to justify withholding the information sought, a burden that the district could not meet. The district did not establish that the narrow privacy rights invaded were so fundamental that they outweighed the public's fundamental and necessary right

to be informed concerning the workings of its government. (Opinion by Stone (S. J.), P. J., with Gilbert and Abbe, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Records and Recording Laws § 12.5--Inspection of Public Records--Names and Addresses of Water District Customers Exceeding Water Allocation--Review of Order Denying Disclosure. --The superior court, in placing the burden on a newspaper to give reasons why the court should not limit the newspaper's access to the names and addresses of a water district's customers who exceeded their water allocation, and inferring on the basis of mere speculation the possibility of harassment of and danger to customers as a result of such access, exceeded its jurisdiction, and thus its order denying access was reviewable by extraordinary writ of review. Where a court conscientiously follows the law but reaches an arguably incorrect conclusion within the exercise of its jurisdiction, there is no basis for annulling its decision by writ of review. However, if the court acts contrary to the statutorily authorized procedure, such as that set forth in *Gov. Code*, § 6255 (withholding of public records from inspection), it acts in excess of its jurisdiction and a writ of review, or certiorari, will lie.

(2) Records and Recording Laws § 12--Inspection of Public Records--Inspection Right as Balanced Against Privacy Right. --*Cal. Const.*, art. I, § 1, guarantees all persons the inalienable right to privacy. Nonetheless, the public and the press have a right to review the government's conduct of its business. The Legislature, mindful of the right of individuals to privacy, has deemed the public's right of access to information concerning the conduct of public business a fundamental and necessary interest of citizenship. Consequently, in enacting the California Public Records Act (*Gov. Code*, § 6250 *et seq.*), the Legislature balanced the individual's privacy interest with the right to know about the conduct of public business. The specific exemptions from this general requirement of disclosure, which are listed in *Gov. Code*, § 6254, are construed narrowly to insure maximum disclosure of the conduct of governmental

operations

(3) Records and Recording Laws § 12--Inspection of Public Records--Agency's Burden of Justifying Nondisclosure. --Under *Gov. Code, § 6255* (withholding of public records from inspection), the burden is on the agency to justify the need for nondisclosure.

(4) Records and Recording Laws § 12.5--Inspection of Public Records--Names and Addresses of Water District Customers Exceeding Water Allocation. --In an action under the California Public Records Act (*Gov. Code, § 6250 et seq.*) by a newspaper seeking access to the names and addresses of a water district's customers who exceeded their water allocation after implementation of a water rationing ordinance, the trial court exceeded its jurisdiction in failing to follow the directive of *Gov. Code, § 6255*, to place the burden on the district to justify withholding the information sought, a burden that the district could not meet. The district asserted that publication of the information could expose customers to verbal or physical harassment. However, a mere assertion of possible endangerment does not clearly outweigh the public interest in access to public records. The information sought was public records, the class of information sought was not contained among the subsections of the act listing exemptions from the general disclosure requirement (*Gov. Code, § 6254*), nor did the district establish that the narrow privacy rights invaded were so fundamental that they outweighed the public's fundamental and necessary right to be informed concerning the workings of its government. The preservation of water resources is a matter of great concern, and it is the policy of the state to foster the beneficial use of water and discourage waste.

COUNSEL: Price, Postel & Parma, C. Michael Cooney and David K. Hughes for Petitioner.

No appearance for Respondent.

Wayne K. Lemieux, Dorothy Lou Crisp, Robert E. Goodwin and Russell Ruiz for Real Party in Interest.

JUDGES: Opinion by Stone (S. J.), P. J., with Gilbert and Abbe, JJ., concurring.

OPINION BY: STONE

OPINION

[\*1581] [\*\*22] Does a newspaper have the right to the names and addresses of a water district's customers who exceeded their water allocation after implementation of a water rationing ordinance? We conclude that the mere assertion by the water district of possible harassment or physical endangerment does not "clearly outweigh" the public interest in disclosure of these records. We further [\*\*23] conclude that the superior court, in denying [\*1582] the newspaper access to the water district's list of excessive water users, exceeded its jurisdiction in failing to place the burden to justify nondisclosure of these records on the water district, and shall annul its order.

Procedural Background

As a result [\*\*\*2] of a severe and protracted water shortage, the Goleta Water District (District) adopted ordinance 89-1, effective May 1, 1989, prohibiting certain uses of water and imposing limitations upon the amount of water which customers may receive from the District. Methods of enforcement include imposition of a surcharge of four times the highest billing rate for excessive use in the first and second billing periods, ten times the highest billing rate for the third and fourth periods of excessive use, imposition of a flow restrictor after the third consecutive billing period of excessive use, and ultimately, the draconian measure of termination (of water service, not the customer). The ordinance also permits a customer's account to be credited for any amount of surcharge payments if total water usage during the 12-month period from May 1, 1989, to May 1, 1990, is equal to or less than the total allowed usage for that 12-month period.

Petitioner, a newspaper, sought, under the California Public Records Act (*Gov. Code, § 6250 et seq.*),<sup>1</sup> a court order that the District disclose the names and addresses of those customers who exceeded their water allocation during the first period after implementation [\*\*\*3] of the ordinance. Petitioner contended that public disclosure -- and resultant embarrassment -- would provide undeniable incentive to comply with the ordinance and the public would be better able to monitor the District's enforcement policies. The District claimed that such information would intrude upon its customers' constitutional right of privacy and that any legitimate purpose for disclosure would be outweighed by the harm that would be visited upon the customers. The District agreed, however, to provide the names of commercial, agricultural, and

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1990 Cal. App. LEXIS 282, \*\*\*3; 17 Media L. Rep. 1773

multifamily users that had exceeded water allocations, as well as account numbers, amount of excess use, and penalties imposed upon individual residential customers. The District refused to disclose the names and addresses of the individual residential customers.

- 1 All statutory references are to the Government Code unless otherwise indicated.

Petitioner moved to compel disclosure of the names and addresses of all customers as constituting public records as defined [\*\*\*4] in section 6252, subdivision (d).<sup>2</sup> The District argued that petitioner's request was premature since the ordinance was only recently implemented. Additionally, it pointed out that since water usage is seasonal, a customer might well use more water in [\*1583] the hot months and be above allocation, but conserve in the cooler months and not use more than the yearly allocation at the end of the 12-month period. The court placed the burden on petitioner to justify the public's right, or need, to know the particular names of individual persons and their addresses, as opposed to statistical information concerning excess use, until such time that the customer becomes a chronic water abuser and subject to imposition of a flow restrictor.<sup>3</sup>

- 2 [HN1] Section 6258 provides that anyone may institute proceedings for injunctive or declaratory relief to enforce the right to inspect or to receive a copy of any public record.

- 3 Under the ordinance, a customer facing imposition of a flow restrictor has a right to a public hearing.

[\*\*\*5] The court stated it could take judicial notice of the amount of litigation concerning water use in Goleta and of the drought condition. It was also aware of the passionate feelings in the community concerning water use, and feared that disclosure of customers' identities would not only subject them to embarrassment, but verbal and possibly physical assault. The court denied the motion to compel disclosure of the names and addresses of individuals and ordered disclosure only of the information already provided to petitioner, including the [\*\*\*24] amount of water used by customers that had exceeded their allotments.

Petitioner now seeks a writ of review. (§ 6259, subd. (c).) It asserts that the information sought is not sensitive, and that there is a public interest in opening to inspection

the names of the District's wayward customers. (See *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 345 [201 Cal.Rptr. 634]; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774 [192 Cal.Rptr. 415].) Further, petitioner argues that the District's assertion of possible harassment is speculative, and does not "clearly [\*\*\*6] outweigh" the public interest in having access to this information. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 652 [230 Cal.Rptr. 362, 725 P.2d 470].) We agree.

## Discussion

### 1. Standard of Review

(1) Petitioner asserts that the court, in making its order, exceeded its jurisdiction. [HN2] An order directing or refusing disclosure is reviewable only by extraordinary writ of review as defined in *Code of Civil Procedure* section 1067. (§ 6259.) Grant of writ of review or certiorari (*Code Civ. Proc.*, § 1067) is limited only to those cases in which a trial court has exceeded its jurisdiction. (*Code Civ. Proc.*, §§ 1068, 1074; *Freedom Newspapers, Inc. v. Superior Court* (1986) 186 Cal.App.3d 1102, 1108-1109 [231 Cal.Rptr. 189].) Where a court conscientiously follows the law but reaches an arguably incorrect conclusion within the exercise of its jurisdiction, there is no [\*1584] basis for annulling its decision by writ of review. (*Freedom Newspapers, supra*, at p. 1109.)

However, [HN3] if the court acts contrary to the statutorily authorized procedure, such as that set forth in section [\*\*\*7] 6255, it acts in excess of its jurisdiction and a writ of review, or certiorari, will lie. (See *Rodman v. Superior Court* (1939) 13 Cal.2d 262, 269 [89 P.2d 109]; *Yoakam v. Small Claims Court* (1975) 53 Cal.App.3d 398, 402-403 [125 Cal.Rptr. 882].) Section 6255 requires the trial court to weigh the public interest served by nondisclosure against the public interest served by disclosure and determine which interest outweighs the other. (See *CBS v. Block*, *supra*, 42 Cal.3d at p. 652.) The agency seeking to withhold the information has the burden of demonstrating a need for nondisclosure. (§ 6255; *Braun v. City of Taft*, *supra*, 154 Cal.App.3d at p. 345.)

Instead, the trial court here placed the onus on the petitioner to give reasons why the court should not limit the amount of access. Additionally, the "evidence" from which the lower court inferred public harassment and

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1990 Cal. App. LEXIS 282, \*\*\*7; 17 Media L. Rep. 1773

danger was mere speculation. Since the trial court did not follow the governing statute, it exceeded its jurisdiction.

## 2. Burden of Proof and Balancing Interests

[\*\*\*8] (2) Article I, section 1, of the California Constitution guarantees all persons the inalienable right to privacy. ( *Scull v. Superior Court* (1988) 206 Cal.App.3d 784, 790 [254 Cal.Rptr. 24]; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 262 [172 Cal.Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118]; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130 [164 Cal.Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219].) Disclosure of the information petitioner seeks, however noble the intention, intrudes upon the privacy interest of the District's customers. Nonetheless, the public and the press have a right to review the government's conduct of its business. ( *CBS, Inc. v. Block, supra*, 42 Cal.3d at p. 654.) The Legislature, mindful of the right of individuals to privacy, has deemed the public's right of access to information concerning the conduct of public business a fundamental and necessary interest of citizenship. ( *Id.*, at p. 651, fn. 5 & 6; [\*\*\*9] § 6250.) "The interest of society in ensuring accountability is particularly strong where the discretion invested in a government official is unfettered, and only a select few are granted the special privilege." [\*\*\*25] ( *CBS, Inc., supra*, at p. 655.)

Consequently, in enacting the Public Records Act, the Legislature balanced the individual's privacy interest with the right to know about the conduct of public business. ( *City of Santa Rosa v. Press Democrat* (1986) [\*1585] 187 Cal.App.3d 1315, 1319 [232 Cal.Rptr. 445].) Specific exemptions from this general requirement of disclosure are listed in section 6254 and are construed narrowly to ensure maximum disclosure of the conduct of governmental operations. ( *Id.*, at pp. 1320-1321; *San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d at pp. 772-773.)

In addition to these express exceptions, [HN4] section 6255 permits the governmental agency to withhold records if it can demonstrate that "on the facts of a particular case the public interest served by not making the record public clearly outweighs [\*\*\*10] the public interest served by disclosure of the record." ( *CBS, Inc. v. Block, supra*, 42 Cal.3d at p. 652, fn. omitted, italics in original; *San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d at p. 780.) (3) Thus the burden is

on the agency to justify the need for nondisclosure. ( *San Gabriel Tribune, supra*, at p. 780.)

## 3. To Disclose or Not to Disclose

(4) Petitioner asserts that the information sought is located in public records open to public inspection (§§ 6252, 6253) and that the claim of privacy of the names of users of excessive water resources is outweighed by the public's "fundamental and necessary right" to be informed concerning the workings of its government. (§ 6250; *CBS, Inc. v. Block, supra*, 42 Cal.3d at p. 651.) In particular, petitioner is concerned about discriminatory enforcement of the ordinance.

The District asserts that publication of those names could expose the individuals to verbal or physical harassment due to the strong currents of emotion on the subject of water overuse, and not simply [\*\*\*11] encourage, through public embarrassment, those individuals to husband their water usage. Additionally, it argues, customers apply for water as a matter of necessity, not choice. Most residents have no alternate sources of water. (Compare *CBS, Inc. v. Block, supra*, 42 Cal.3d at p. 654, where the court stated that those voluntarily applying for the privilege of carrying a handgun could not prevent disclosure of their identities.)

Nonetheless, "[a] mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records." ( *CBS, Inc. v. Block, supra*, 42 Cal.3d at p. 652.) The District should not be allowed to exercise absolute discretion, shielded from public accountability, in deciding which customer is a chronic water abuser. "[HN5] In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." ( *Id.*, at p. 651, fn. omitted.) Disclosure of all who exceed their allocation [\*\*\*12] will ensure that certain individuals do not receive special [\*1586] privileges from the District, or alternatively, are not subject to discriminatory treatment.

The records sought are public records and, in the absence of a privilege or a compelling countervailing interest, "are open to inspection at all times . . ." (§ 6253, subd. (a); *CBS, Inc. v. Block, supra*, 42 Cal.3d at pp. 651-652; *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 650 [117 Cal.Rptr. 106].) Significantly, the class of information sought is not contained among

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1990 Cal. App. LEXIS 282, \*\*\*12; 17 Media L. Rep. 1773

the subsections that list exemptions from the general disclosure requirement. (§ 6254.) Nor has the District established that the narrow privacy rights invaded are so fundamental that they outweigh the public's "fundamental and necessary right" to be informed concerning the workings of its government. (§ 6250; *CBS, Inc. v. Block*, supra, 42 Cal.3d at p. 651.) Even given the [\*\*26] strong concerns about water conservation, the record contains no evidence that revelation of names and addresses of those who have exceeded their [\*\*\*13] water allocation during a billing period will subject those individuals to infamy, opprobrium, or physical assault. <sup>4</sup>

4 We note the recent, well-reasoned opinion of *Times Mirror Co. v. Superior Court* (1990) 217 Cal.App.3d 360 [265 Cal.Rptr. 844], in which the reviewing court held that the Governor's schedules and appointment calendars were subject to disclosure under the California Public Records Act absent an evidentiary showing of legitimate safety concerns.

The preservation of water resources has long been a matter of great concern in California. ( *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443 [189 Cal.Rptr. 346, 658 P.2d 709].) It is the policy of the state to foster the beneficial use of water and discourage waste. (See *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 84 [219 Cal.Rptr. 740]; *Cal. Const., art. X, § 2*.) The rapid population growth in certain portions [\*\*\*14] of Southern California has

exceeded available water resources in the region. Recent years have witnessed a severe drought and water resources in Goleta have thereby been further reduced.

The District asserts that the overdrafting of one's water allocation for a month's period does not necessarily demonstrate noncompliance on the part of the customers. Nonetheless, publication of overdrafting by customers during a given period will discourage profligate use of water during the ensuing months and encourage customers to bring their consumption within the guidelines of the ordinance.

#### Conclusion

The District's fear that outraged citizens will misunderstand the information sought is speculative and does not outweigh the public's right to be informed of the District's implementation of the ordinance. We find that [\*1587] respondent superior court exceeded its jurisdiction in failing to follow the statutory directive to place the burden on the agency to justify withholding the information sought, a burden that, on the record, the District could not meet.

Respondent superior court's order of October 6, 1989, denying the motion to disclose public records is annulled and the matter is [\*\*\*15] remanded to the superior court to issue a new order granting petitioner's motion.



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CITY OF SAN JOSE, Petitioner, v. THE SUPERIOR COURT OF SANTA CLARA  
COUNTY, Respondent; SAN JOSE MERCURY NEWS, INC., Real Party in  
Interest.

No. H019262.

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

74 Cal. App. 4th 1008; 88 Cal. Rptr. 2d 552; 1999 Cal. App. LEXIS 822; 99 Cal. Daily  
Op. Service 7470; 99 Daily Journal DAR 9407

September 8, 1999, Decided

SUBSEQUENT HISTORY: [\*\*\*1] Review Denied  
December 1, 1999, Reported at: 1999 Cal. LEXIS 8606.

PRIOR HISTORY: Santa Clara County Superior  
Court. Super. Ct. No. CV773524. The Honorable Jamie  
Jacobs-May, Trial Judge.

DISPOSITION: Let a peremptory writ of mandate  
issue directing respondent court to vacate its amended  
order and judgment of September 24, 1998, and to enter a  
new and different order denying the San Jose Mercury  
News's petition for writ of mandate. Each party is to bear  
its own costs in this original proceeding.

LexisNexis(R) Headnotes

*Administrative Law > Governmental Information >  
Freedom of Information > General Overview*

*Civil Procedure > Appeals > Standards of Review > De  
Novo Review*

*Transportation Law > Air Transportation > Noise  
Control*

[HN1] Pursuant to Cal. Gov't Code § 6259(c), an order of  
the trial court under the California Public Records Act,  
Cal. Gov't Code § 6250 et seq., which either directs  
disclosure of records by a public official or supports the

official's refusal to disclose records, is immediately  
reviewable by petition to the appellate court for issuance  
of an extraordinary writ. The standard for review of the  
order is an independent review of the trial court's ruling;  
factual findings made by the trial court will be upheld if  
based on substantial evidence.

*Administrative Law > Governmental Information >  
Freedom of Information > General Overview*  
[HN2] See Cal. Gov't Code § 6250.

*Administrative Law > Governmental Information >  
Freedom of Information > General Overview*

[HN3] Disclosure of public records has the potential to  
impact individual privacy. The California Public Records  
Act, Cal. Gov't Code § 6250 et seq. defines "public  
records" broadly to include any writing containing  
information relating to the conduct of the public's  
business prepared, owned, used, or retained by any state  
or local agency regardless of physical form or  
characteristics. § 6252. Public records can include  
personal details about private citizens, and disclosure  
may infringe upon privacy interests.

*Administrative Law > Governmental Information >  
Freedom of Information > General Overview*

[HN4] Disclosure of public records thus involves two

fundamental yet competing interests: (1) prevention of secrecy in government; and (2) protection of individual privacy. Consequently, both the Freedom of Information Act and the California Public Records Act (the Act), *Cal. Gov't Code § 6250 et seq.* expressly recognize that the public's right to disclosure of public records is not absolute. In California, the Act includes two exceptions to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to § 6254; and (2) the catchall exception of § 6255, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*

*Administrative Law > Governmental Information > Personal Information > General Overview*

[HN5] In evaluating whether a request for information lies within the scope of a Freedom of Information Act exemption, such as Exemption 6, that bars disclosure when it would amount to an invasion of privacy that is to some degree unwarranted, a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect. The public interest in disclosure which must be weighed, is the interest in whether disclosure would contribute significantly to public understanding of government activities.

*Administrative Law > Governmental Information > General Overview*

[HN6] The burden of proof is on the proponent of nondisclosure, who must demonstrate a "clear overbalance" on the side of confidentiality. *Cal. Gov't Code § 6255*. The purpose of the requesting party in seeking disclosure cannot be considered. *Cal. Gov't Code § 6257.5*. This is because once a public record is disclosed to the requesting party, it must be made available for inspection by the public in general. It is also irrelevant that the requesting party is a newspaper or other form of media, because it is well established that the media has no greater right of access to public records than the general public. Nor is the convenience of researchers a factor to be considered.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*

[HN7] In determining whether public records which are not expressly exempted from disclosure must be disclosed over the government's objection, California courts apply the *Cal. Gov't Code § 6255* balancing test for the catchall exception on a case-by-case basis. Where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*

[HN8] Courts have upheld the government's refusal to release public records when the public interest in nondisclosure clearly outweighed the public interest in disclosure.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*

*Administrative Law > Governmental Information > Personal Information > General Overview*

*Constitutional Law > Substantive Due Process > Privacy > Personal Information*

[HN9] Disclosure of records regarding private citizens, identifiable by name, is not what the framers of the Freedom of Information Act had in mind. Courts scrutinize requests for disclosure of names and home addresses contained in public records, because individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail. The courts are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*

*Administrative Law > Governmental Information > Personal Information > General Overview*

[HN10] In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of shedding light on an agency's performance of its statutory duties. Where disclosure of names and addresses would not serve this purpose, denial of the request for disclosure has been upheld.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*  
*Administrative Law > Governmental Information > Personal Information > General Overview*  
*Governments > Local Governments > Employees & Officials*

[HN11] Courts recognize that the public interest in disclosure is minimal, even when the requester asserts that personal contact is necessary to confirm government compliance with mandatory duties, where the requester has alternative, less intrusive means of obtaining the information sought.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*

[HN12] Where the disclosure of names and addresses is necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power, disclosure is upheld.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*  
*Administrative Law > Governmental Information > Personal Information > General Overview*

[HN13] The privacy rights of those who complain to their government is recognized when courts evaluate requests for disclosure of personal information from public records.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*  
*Administrative Law > Governmental Information > Personal Information > General Overview*

[HN14] Disclosure of names and addresses of complainants may have the indirect effect of creating a specialized mailing list which is then available to anyone for any purpose.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*  
*Administrative Law > Governmental Information > Personal Information > General Overview*  
*Transportation Law > Air Transportation > Noise Control*

[HN15] Disclosure of the names, addresses, and telephone numbers of airport noise complainants is

determined by application of the *Cal. Gov't Code* § 6255 balancing test.

## SUMMARY:

### CALIFORNIA OFFICIAL REPORTS SUMMARY

A newspaper initiated writ proceedings pursuant to the Public Records Act (*Gov. Code*, § 6250 *et seq.*), seeking to compel a city to disclose the names, addresses, and telephone numbers of persons who had made complaints to the city about municipal airport noise. The trial court ordered the city to disclose the information. (Superior Court of Santa Clara County, No. CV773524, Jamie A. Jacobs-May, Judge.)

The Court of Appeal ordered issuance of a writ of mandate directing the trial court to enter a new and different order denying the newspaper's petition for a writ of mandate. The court held that, applying the *Gov. Code*, § 6255, balancing test of the Public Records Act, the public interest in the nondisclosure of the complainants' personal information clearly outweighed the public interest in disclosure. The complainants had a significant privacy interest in their names, addresses, telephone numbers as well as in the fact that they had made a complaint to their government, and disclosure of this information would have had a chilling effect on future complaints. In contrast, the public interest in disclosure of personal information about airport noise complainants was minimal. (Opinion by Cottle, P. J., with Premo and Elia, JJ., concurring.)

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES Classified to California Digest of Official Reports

(1) Records and Recording Laws § 16—Inspection of Public Records—Public Records  
Act—Actions—Standard of Review. --Pursuant to *Gov. Code*, § 6259, *subd. (c)*, of the Public Records Act, an order of the trial court which either directs disclosure of records by a public official or supports the official's refusal to disclose records, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ. The standard for review of the order is an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence.

(2) Records and Recording Laws § 12--Inspection of Public Records--Public Records Act--Purpose--Construction. --The Public Records Act (*Gov. Code, § 6250 et seq.*) was passed to ensure public access to vital information about the government's conduct of its business. The act was modeled upon the federal Freedom of Information Act (5 U.S.C. § 552 *et seq.*), and has a common purpose. Accordingly, federal legislative history and judicial construction of the Freedom of Information Act may be used in construing California's act.

(3) Records and Recording Laws § 12--Inspection of Public Records--Public Records Act--Freedom of Information Act--Public's Right to Disclosure--Exceptions--Test. --Disclosure of public records involves two fundamental yet competing interests: (1) prevention of secrecy in government and (2) protection of individual privacy. Consequently, both the federal Freedom of Information Act (FOIA) (5 U.S.C. § 552 *et seq.*) and the California Public Records Act (*Gov. Code, § 6250 et seq.*) expressly recognize that the public's right to disclosure of public records is not absolute. The Public Records Act includes two exceptions to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to *Gov. Code, § 6254*, and (2) the catchall exception of *Gov. Code, § 6255*, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. A similar balancing test is utilized in FOIA cases, when an issue of disclosure versus privacy arises. In evaluating whether a request for information lies within the scope of an FOIA exemption that bars disclosure when it would amount to an invasion of privacy that is to some degree unwarranted, a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect. The public interest in disclosure that must be weighed is the interest in whether disclosure would contribute significantly to public understanding of government activities.

(4) Records and Recording Laws § 12--Inspection of Public Records--Public Records Act--Public's Right to Disclosure--Exceptions--Catchall Exception--Burden of Proof. --Under the catchall exception of the Public Records Act (*Gov. Code, § 6255*), which allows a government agency to withhold records if it can

demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure, the burden of proof is on the proponent of nondisclosure, who must demonstrate a clear overbalance on the side of confidentiality. The purpose of the requesting party in seeking disclosure cannot be considered (*Gov. Code, § 6257.5*), because once a public record is disclosed to the requesting party, it must be made available for inspection by the public in general. It is also irrelevant that the requesting party is a newspaper or other form of media, because the media have no greater right of access to public records than the general public. Nor is the convenience of researchers a factor to be considered. Thus, in determining whether public records that are not expressly exempted from disclosure must be disclosed over the government's objection, courts apply the *Gov. Code, § 6255* balancing test for the catchall exception on a case-by-case basis. Where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information.

(5) Records and Recording Laws § 16--Inspection of Public Records--Public Records Act--Actions--To Compel Disclosure of Airport Noise Complainants' Personal Information. --In writ proceedings initiated by a newspaper seeking to compel a city to disclose the names, addresses, and telephone numbers of persons who had made complaints to the city about municipal airport noise, the trial court erred in ordering the city to disclose the information. Applying the *Gov. Code, § 6255*, balancing test of the Public Records Act, the public interest in the nondisclosure of the complainant's personal information clearly outweighed the public interest in disclosure. The complainants had a significant privacy interest in their names, addresses and telephone numbers as well as in the fact that they had made a complaint to their government, and disclosure of this information would have had a chilling effect on future complaints. In contrast, the public interest in disclosure of personal information about airport noise complainants was minimal, since the city made available all the information it had concerning the complaints, except for the names, addresses, and telephone numbers of the complainants. The newspaper also had alternative means of contacting and interviewing the complainants.

[See 2 Witkin, Cal. Evidence (3d ed. 1986) § 1249 *et seq.*]

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No appearance for Respondent.

Edward P. Davis, Jr.; Skjervén, Morrill, MacPherson, Franklin & Friel and James M. Chadwick for Real Party in Interest.

JUDGES: Opinion by Cottle, P. J., with Premo and Elia, JJ., concurring.

OPINION BY: COTTLE

OPINION

[\*1011] [\*\*554] COTTLE, P. J.

## I. INTRODUCTION

This original proceeding concerns an issue [\*\*\*2] of first impression under the California Public Records Act, *Government Code section 6250 et seq.*<sup>1</sup> (the Act): whether a city may refuse to disclose the names, addresses, and telephone numbers of persons who have made complaints to the city about municipal airport noise. The City of San Jose (City) petitions for a writ of mandate directing respondent court to vacate its amended order and judgment, which (1) granted the petition of real party in interest, the San Jose Mercury News, Inc. (Mercury News), for a writ of mandate; and (2) directed issuance of a writ compelling City to disclose the names, addresses, [\*\*555] and telephone numbers of all persons who made airport noise complaints in January 1998, with redaction only of the names, addresses, and telephone numbers of complainants where that information is protected by statute.<sup>2</sup>

1 All statutory references hereafter are to the Government Code, unless otherwise noted.

2 We granted the application of City and County of San Francisco and 51 additional cities for leave to file an amicus curiae brief in support of City's petition for writ of mandate. The additional cities on the brief are the cities of Albany, Alameda,

Bakersfield, Benecia, Brentwood, Buelton, Burbank, Carlsbad, Carpinteria, Chula Vista, Del Rey Oaks, Exeter, Fremont, Hawaiian Gardens, Hollister, Huntington Beach, Lafayette, Lakewood, Lindsay, Los Altos, Marina, Millbrae, Modesto, Monterey, Napa, Needles, Newport Beach, Pacifica, Palm Desert, Pico Rivera, Port Hueneme, Porterville, Redlands, San Diego, San Pablo, Santa Paula, Santa Rosa, Sunnyvale, Thousand Oaks, Tiburon, Tracy, Tulare, Vacaville, Victorville, Walnut, Walnut Creek, Westminster, Whittier, Woodlake, and the Town of Atherton.

[\*\*\*3] City contends that respondent court erred, because the public interest in disclosure of the names, addresses, and telephone numbers of persons who have made airport noise complaints is clearly outweighed by the public interest in protecting the complainants' privacy and in preventing a chilling effect on complaints. We agree. Under the facts of this particular case, where [\*1012] City makes public a monthly noise report and other records which provide a wealth of information about airport noise complaints, the public's interest in disclosure of the complainants' identity and personal information is minimal. It is not necessary to disclose the names, addresses, and telephone numbers of the complainants for the public to have access to vital information about City's performance of its state-mandated duty to record and report airport noise complaints. Accordingly, we find that the public interest in protecting the privacy of noise complainants and in preventing a chilling effect on complaints, clearly outweighs the public interest in disclosure of complainants' names, addresses, and telephone numbers. We therefore issue a peremptory writ of mandate as requested by City.

## II. FACTUAL [\*\*\*4] AND PROCEDURAL BACKGROUND

### A. *The Mercury News's California Public Records Act Request*

City owns and operates the San Jose International Airport (Airport). In March 1998, the Mercury News, a daily newspaper of general circulation, sent a written request to Airport's director of aviation for disclosure of public records in accordance with the Act. In particular, the Mercury News sought access to the names, addresses, and telephone numbers of 215 individuals who had made

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written, telephonic, or e-mail complaints about airport noise during the month of January 1998. The Mercury News also sought disclosure of tapes and transcriptions of the January 1998 telephonic complaints.

City operates Airport under a noise variance from California's airport noise standards, as set forth in the *California Code of Regulations, title 21, section 5012*. As a condition of maintaining the noise variance in effect, the California Department of Transportation requires City to implement a program for accepting, responding to, and reporting airport noise complaints. Members of the public may make complaints by telephoning Airport, and providing their name, address, telephone number, and time and nature [\*\*\*5] of their complaint, either directly to Airport staff, or by leaving a recorded message. The complaints are made voluntarily, and Airport does not provide any assurances of confidentiality. City intends the noise complaint program to encourage complaints, which are then independently investigated by City.

As part of its program, City prepares monthly noise reports. These reports summarize the following complaint information for each month: (1) the total number of noise complaints; (2) how many persons made the complaints; (3) average complaints per day; (4) location of complaints [\*\*556] by city area; (5) time of day of complaints; and (6) a breakdown of the nature of the complaints, [\*1013] including categorization of whether private or commercial planes were involved, and the type of complaints (intrusion, loud aircraft, overflight, frequency, or other).

City also maintains a computer data base which it describes as "contain[ing] the names, addresses, telephone numbers, the date and time of the actual event as reported by the complainant, the date and time the call was recorded, the complainant's reported zip code, the designated noise sensitive areas corresponding [\*\*\*6] to specific zip codes, whether the complainant is a first time caller, whether the complaint regards a commercial or general aviation flight, the type of complaint (e.g. loud, frequency or intrusion related), and any additional comments made by the complainant and flight details regarding intrusions associated with the complaint." A printed summary of the complaint data base, excluding the names, addresses, and telephone numbers of the complainants, can be prepared by City.

In response to the Mercury News's request for disclosure under the Act, the San Jose City Attorney's

office advised that City could not release the names, addresses and telephone numbers of the complainants because their privacy rights outweighed the public interest in disclosure. The city attorney also advised that City had no transcriptions of complaint calls. However, City provided the newspaper with a copy of its monthly noise report. City also offered to provide the Mercury News with a list indicating the date and time of each telephone call, and the nature of the airport noise complaint made during the call.

#### *B. Writ Proceedings in the Trial Court*

The Mercury News was not satisfied with the airport [\*\*\*7] noise complaint information provided by City, and filed a petition for a writ of mandate in respondent court, pursuant to section 6258. <sup>3</sup> The petition sought a writ of mandate compelling City to disclose the names, addresses and telephone numbers of the January 1998 airport noise complainants, as well as all tapes and transcriptions of their complaints. The Mercury News argued that it was entitled to disclosure of this information under the Act, because the information concerned a matter of significant public interest, airport noise, and therefore the public interest in disclosure was not outweighed by the complainants' privacy interest.

3 Section 6258 provides, in pertinent part, "Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter."

Specifically, the Mercury News contended in its petition that writ [\*\*\*8] relief was necessary, because "[w]ithout the identity of the complainants or specifics regarding their complaints, the summary information offered by the [\*1014] City is next to useless. The validity of the complaints cannot be evaluated without access to those individuals doing the complaining. Understanding the extent of the noise problem--and thereby providing information to the public so the positions of the City and those complaining about the noise can be evaluated--is impossible without access to the details, e.g., the nature of the complaints themselves."

Respondent court issued an alternative writ of mandate and order to show cause in April 1998. City filed opposition to the petition for writ of mandate. In its

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opposition, City argued that the airport noise complainants' privacy interest in their personal information outweighed the public interest in disclosure of their names, addresses, and telephone numbers. If this personal information was disclosed, City asserted, the complainants would be subject to harassment and intimidation, and the public's reporting of airport noise complaints would be chilled.

[\*\*557] In support of its arguments in opposition, City [\*\*\*9] submitted copies of a number of letters it had received from Jon Rodgers (Rodgers), representing an organization called Aircraft Pilots of the Bay Area, Inc. (Aircraft Pilots). In his letters, Rodgers requested that City comply with the Act by disclosing the names, addresses, and telephone numbers of airport noise complainants. City had refused to do so. Additionally, City submitted a copy of an article from a newsletter captioned "California Pilot, Official Publication of California Pilots Association[,] The Airport Defenders," dated May 1995. The newsletter article was entitled "The More You Complain, the More You Must Disclose" and discussed Rodgers's efforts to obtain disclosure of the identity of airport noise complainants. Included in the article was the following statement: "The effect of Rodgers' message on complaining homeowners and anti-airport groups has been salutary. . . . [P] As reported last month, the latest shining example of how well the disclosure law works when anti-airport groups are given the message, is the success of the Tahoe Valley Airport. Noise complaints there fell from a high of 450 prior to 1994, to only 36 last year."

On June 5, 1998, respondent [\*\*\*10] court held a hearing on the Mercury News's petition for a writ of mandate. The court granted the petition, explaining that the public interest in receiving information about airport noise complaints was very strong: "[T]he public has the right to know whether or not the governmental entity is doing a good job in taking care of the problems and what the nature and extent of the complaints are to hold the governmental entity accountable for decision making in that regard." The court concluded that this strong public interest was not outweighed by City's mere speculation that disclosure of complainants' names, addresses, and telephone numbers would chill further complaints, noting that City's evidence of potential [\*1015] harassment by pilots' organizations was based on old letters which lacked probative value, and because there was no evidence of pilots' organizations actually intimidating a

noise complainant. On June 23, 1998, the court issued the writ of mandate as requested by the Mercury News.

Subsequently, City filed a motion for reconsideration pursuant to *Code of Civil Procedure section 1008*, contending that it had new evidence of the threat [\*\*\*11] of intimidation of airport noise complainants by the Aircraft Pilots organization. The new evidence submitted by City included more recent letters from the Aircraft Pilots organization to the manager of the Van Nuys Airport, in which the organization requested disclosure of name, address and telephone number of a frequent airport noise complainant. City also submitted copies of letters from Aircraft Pilots to real estate brokers. The letters advised the real estate brokers of the risk that homeowners would expose themselves to fraud liability if they complained about airport noise, then later failed to disclose the noise problem to home buyers.

Respondent court granted the motion for reconsideration, and on September 24, 1998, issued an amended writ of mandate. As a result of the Mercury News's concession during oral argument that certain complainants' personal information should be redacted, the writ stated, "Immediately upon receipt of this writ to permit public access to and provide copies of the complaints about Airport noise received by the City or the San Jose Airport, including, if any, transcriptions of the complaints, and the names, addresses, and phone numbers of the individuals [\*\*\*12] who complained. You may within 20 days redact from the records provided pursuant to this order and judgment the names, addresses, and/or phone numbers of the individuals who have complained and whose names, addresses, and/or phone numbers are expressly made exempt from public disclosure by statute." The court stayed the execution of the amended writ of mandate until such time as this court issued a ruling on whether [\*\*558] the writ would be stayed pending appellate review.

#### C. Writ Proceedings in the Appellate Court

City objected to the trial court's amended order and judgment directing issuance of the writ to City, and filed a writ petition in this court, seeking a peremptory writ of mandate directing respondent court to vacate its amended order and judgment, and to issue a new order denying the Mercury News's writ petition. City also requested a temporary stay of the amended order pending our consideration of its writ petition. We granted the temporary stay as requested, and issued an order to show

cause why the relief sought by City in its petition for writ of mandate should not be granted.

### [\*1016] III. DISCUSSION

#### A. The Standard of Review for Orders Under [\*\*\*13] the Act

(1) [HN1] Pursuant to section 6259, subdivision (c), an order of the trial court under the Act, which either directs disclosure of records by a public official or supports the official's refusal to disclose records, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1336 [283 Cal. Rptr. 893, 813 P.2d 240] (hereafter *Times Mirror*).) The standard for review of the order is "an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence." (*Ibid.*) In the present case, respondent court made a finding that City had not shown that any airport noise complainants were actually intimidated by the possibility of disclosure of their names, addresses, and telephone numbers, and we conclude that substantial evidence supports that finding. Keeping that finding in mind, we review respondent court's amended order and judgment de novo.

#### B. Disclosure of Public Records and the Right to Privacy

[\*\*\*14] Section 6250 expressly sets forth the purpose of the Act: [HN2] "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (See *Times Mirror, supra*, 53 Cal. 3d at p. 1338; see also *Wilson v. Superior Court* (1996) 51 Cal. App. 4th 1136, 1141 [59 Cal. Rptr. 2d 537].)

(2) Thus, the Act was passed "to ensure public access to vital information about the government's conduct of its business." (*CBS, Inc. v. Block* (1986) 42 Cal. 3d 646, 656 [230 Cal. Rptr. 362, 725 P.2d 470] (hereafter *CBS*).)

The Act was modeled upon the federal Freedom of Information Act (5 U.S.C. § 552 *et seq.*, hereafter FOIA), and has a common purpose. (*Times Mirror, supra*, 53 Cal. 3d at p. 1338; see also *Department of Defense v. FLRA* (1994) 510 U.S. 487 [114 S. Ct. 1006, 127 L. Ed.

2d 325] (hereafter *Department of Defense*) [FOIA's [\*\*\*15] "core purpose" ( *id.* at p. 495 [114 S. Ct. at p. 1012]) is to contribute significantly to public understanding of government activities].) Accordingly, federal "legislative history and judicial construction of the FOIA" may be used in construing California's Act. (*Times Mirror, supra*, 53 Cal. 3d at p. 1338.)

[HN3] Disclosure of public records has the potential to impact individual privacy. The Act defines "public records" broadly to include "any writing containing [\*\*\*1017] information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (§ 6252, subd. (e); *Wilder v. Superior Court* (1998) 66 Cal. App. 4th 77, 81 [77 Cal. Rptr. 2d 629].) Public records [\*\*\*559] can include "personal details about private citizens," and disclosure may infringe upon privacy interests. (*U.S. Dept. of Justice v. Reporters Committee* (1989) 489 U.S. 749, 764, 766 [109 S. Ct. 1468, 1477-1478, 103 L. Ed. 2d 774] (hereafter *Reporters Committee* [\*\*\*16] ); see also *Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645, 651 [117 Cal. Rptr. 106] (hereafter *Black Panther Party*) ["[s]ocietal concern for privacy focuses on minimum exposure of personal information collected for governmental purposes"].)

(3) [HN4] Disclosure of public records thus involves two fundamental yet competing interests: (1) prevention of secrecy in government; and (2) protection of individual privacy. (*Black Panther Party, supra*, 42 Cal. App. 3d at p. 651.) Consequently, both the FOIA and the Act expressly recognize that the public's right to disclosure of public records is not absolute. <sup>4</sup> In California, the Act includes two exceptions to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to section 6254 <sup>5</sup>; and (2) the "catchall exception" of section 6255, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. [\*\*\*17] <sup>6</sup> (*CBS, supra*, 42 Cal. 3d at p. 652.)

4 An FOIA example is exemption 6, which protects personnel and medical and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. § 552(b)(6)). (*Department of Defense,*

*supra*, 510 U.S. at pp. 494-495 [114 S. Ct. at pp. 1011-1013].)

5 Personal information expressly protected from disclosure under the Act, as set forth in section 6254, include library circulation records (subd. j), statements of personal worth or financial data collected by a licensing agency (subd. n), information contained in applications to carry concealed weapons (subd. (u)(1)), home addresses and telephone numbers of peace officers, judges, court commissioners set forth in applications or licenses to carry concealed weapons (subd. (u)(2), (3)), and financial data in applications for registration as a service contractor (subd. (x)). Other personal information also expressly exempted from disclosure by the Act includes home addresses and telephone numbers of registered voters (§ 6254.4), home addresses, telephone numbers and usage data of utility customers (§ 6254.16), home addresses and telephone numbers of elected or appointed officials (§ 6254.21), home addresses and telephone numbers of state, school district, and county office of education employees (§ 6254.3) residence addresses in Department of Housing and Community Development records where confidentiality requested (§ 6254.1, subd. (a)), and residence or mailing addresses in Department of Motor Vehicles records (§ 6254.1).

[\*\*\*18]

6 Section 6255 provides, "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

[\*1018] A similar balancing test is utilized in FOIA cases, when an issue of disclosure versus privacy arises: [HN5] "[I]n evaluating whether a request for information lies within the scope of a FOIA exemption, such as Exemption 6, that bars disclosure when it would amount to an invasion of privacy that is to some degree 'unwarranted,' a court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect." (*Department of Defense, supra*, 510 U.S. at p. 495 [114 S. Ct. at p. 1012].) The public interest in disclosure which must be weighed, is the

interest in whether disclosure would [\*\*\*19] contribute significantly to public understanding of government activities. (*Ibid.*)

(4) [HN6] The burden of proof is on the proponent of nondisclosure, who must demonstrate a "clear overbalance" on the side of confidentiality. (§ 6255; *Black Panther Party, supra*, 42 Cal. App. 3d at p. 657.) The purpose of the requesting party in seeking disclosure cannot be considered. (§ 6257.5; *Connell v. Superior Court* (1997) 56 Cal. App. 4th 601, 616 [65 Cal. Rptr. 2d 738]; see also *Department of Defense, supra*, 510 U.S. at p. 495 [114 S. Ct. at pp. 1012-1013].) This is because once a public record is disclosed to the requesting party, it must be made available for inspection by the public in general. (*Black Panther Party, supra*, 42 Cal. App. 3d at p. 656.) It is also irrelevant that the requesting party is a newspaper or other form of media, because it is well established that the media has no greater right of access to public records than the general public. (*Rogers v. Superior Court* (1993) 19 Cal. App. 4th 469, 476 [23 Cal. Rptr. 2d 412].) [\*\*\*20] Nor is the convenience of researchers a factor to be considered. (*Reporters Committee, supra*, 489 U.S. at p. 772, fn. 20 [109 S. Ct. at p. 1481].) ["... it was never suggested that the FOIA would be a boon to academic researchers, by eliminating their need to assemble on their own data which the government has already collected".]

Thus, [HN7] in determining whether public records which are not expressly exempted from disclosure must be disclosed over the government's objection, California courts apply the section 6255 balancing test for the catchall exception on a case-by-case basis. Where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information. (See *CBS, supra*, 42 Cal. 3d at pp. 656-657 [names, home addresses and applications of persons who obtained concealed weapons permits must be disclosed]; *New York Times Co. v. Superior Court* (1990) 218 Cal. App. 3d 1579, 1585-1586 [268 Cal. Rptr. 21] [disclosure [\*\*\*21] of names and addresses of excessive water users ordered]; *New York Times Co. v. Superior Court* (1997) 52 Cal. App. 4th 97, 104 [60 Cal. Rptr. 2d 410] [names of sheriff's deputies who fired weapons must be disclosed].)

[\*1019] Conversely, [HN8] courts have upheld the government's refusal to release public records when the public interest in nondisclosure clearly outweighed the

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public interest in disclosure. (See *Reporters Committee*, *supra*, 489 U.S. at pp. 774-775. [109 S. Ct. at pp. 1482-1483] [no disclosure of FBI rap sheet when disclosure would serve curiosity rather than public interest]; *Times Mirror*, *supra*, 53 Cal. 3d at p. 1345-1346 [Governor's appointment schedules and calendars properly withheld to protect public interest in decisionmaking process and governor's security]; *Wilson v. Superior Court*, *supra*, 51 Cal. App. 4th at p. 1141 [no disclosure of applications for appointment to county board of supervisors due to chilling effect on applications and negative impact on decisionmaking process].)

#### C. Disclosure [\*\*\*22] of the Identities and Personal Information of Complainants

As the decisions noted above indicate, requests for disclosure of public records which contain personal information about individuals often trigger litigation under the Act and the FOIA. However, no decisions have been cited by the parties or located through our own research, which address the issue of whether a city must disclose identities of airport noise complainants. Public records decisions in other contexts, which concern the disclosure of addresses and telephone numbers, and/or the identity of complainants, provide a helpful framework for deciding the issue at hand.

##### 1. Disclosure of Names and Addresses

First, we note that the United States Supreme Court has stated that, [HN9] "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." (*Reporters Committee*, *supra*, 489 U.S. 749, 765 [109 S. Ct. 1468, 1478].) Courts have scrutinized requests for disclosure of names and home addresses contained in public records, because individuals have [\*\*\*23] a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail. (*Department of Defense*, [\*\*\*561] *supra*, 510 U.S. at pp. 500-501 [109 S. Ct. at pp. 1015-1016] ["We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions."].)

[HN10] In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of "shed[ding] light on an agency's performance of its statutory duties." (

*Voinche v. F.B.I.* (D.D.C. 1996) 940 F. Supp. 323, 330 (hereafter *Voinche*)). Where disclosure of names and addresses would not serve this purpose, denial of the request for disclosure has been upheld. (*Department of Defense*, *supra*, 510 U.S. at p. 502 [114 S. Ct. at p. 1016] [\*1020] ["privacy interest of bargaining unit employees in nondisclosure of their home addresses [\*\*\*24] substantially outweighs the negligible FOIA-related public interest in disclosure"]; *Painting Industry of Hawaii v. Dept. of Air Force* (9th Cir. 1994) 26 F.3d 1479, 1486 (hereafter *Painting Industry*) [no disclosure of names and addresses on employee payroll when disclosure only marginally useful in uncovering "what the government is up to"]; *Voinche*, *supra*, 940 F. Supp. at p. 330 [workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials]; *Local 1274, Ill. Fed. of Teachers v. Niles* (1997) 287 Ill.App.3d 187, 193 [222 Ill.Dec. 602, 678 N.E.2d 9, 13] [names and addresses of school district parents had "nothing to do with the duties of any public servant"].) [HN11] Courts have also recognized that the public interest in disclosure is minimal, even when the requester asserts that personal contact is necessary to confirm government compliance with mandatory duties, where the requester has alternative, less intrusive means of obtaining the information sought. (See, [\*\*\*25] e.g., *Painting Industry*, *supra*, 26 F.3d at p. 1485.)[HN12]

However, where the disclosure of names and addresses is necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power, disclosure has been upheld. (*CBS*, *supra*, 42 Cal. 3d at p. 656 [revealing identity of concealed weapons permit holders permits public ascertainment of whether law applied evenhandedly]; *New York Times v. Superior Court*, *supra*, 52 Cal. App. 4th at pp. 104-105 [disclosure of names of sheriff's deputies who fired fatal shot permits check against arbitrary exercise of official power]; *New York Times v. Superior Court*, *supra*, 218 Cal. App. 3d at p. 1585 [disclosure of excess water users will ensure individuals do not receive special privileges].)

##### 2. Disclosure of the Identity of Complainants

[HN13] The privacy rights of those who complain to their government have [\*\*\*26] also been recognized when courts evaluate requests for disclosure of personal information from public records. With regard to

complaints of criminal wrongdoing, it has been stated, "Complainants often demand anonymity. The prospect of public exposure discourages complaints and inhibits effective enforcement." (*Black Panther Party*, *supra*, 42 Cal. App. 3d at p. 653.) In determining that letters of complaint to the Federal Aviation Agency about a pilot were exempt from disclosure under the FOIA, the federal appeals court noted the President's statement when signing the FOIA into law: "A citizen must be able in confidence to complain to his Government and to provide information . . . I know the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of [\*1021] information." (*Evans v. Department of Transportation of United States* (5th Cir. 1971) 446 F.2d 821, 824, fn. 1.)

[\*\*562] Similarly, a New York state appeals court judge remarked, "I do not believe that a citizen who complains to or inquires of his government [\*\*\*27] expects that his correspondence revealing among other things his identity and home address will come into the hands of private entrepreneurs who seek to solicit his business." (*Goodstein v. Shaw* (1983) 119 Misc.2d 400 [463 N.Y.S.2d 162] (hereafter *Goodstein*) [denying under New York Freedom of Information Law an attorney's request for names and addresses of complainants to the state's division of human rights].) This decision and others recognize [HN14] that disclosure of names and addresses of complainants may have the indirect effect of creating a specialized mailing list which is then available to anyone for any purpose. (*Goodstein*, *supra*, 119 Misc.2d at pp. 400-401 [463 N.Y.S.2d at pp. 162-163]; see also *Center for Auto Safety v. NHTSA* (D.D.C. 1993) 809 F. Supp. 148, 149-150 (hereafter *Center for Auto Safety*).)

In *Center for Auto Safety*, 809 F. Supp. 148, the privacy rights of complainants under the FOIA were considered by a federal district court. In this case, a private consumer group called the Center [\*\*\*28] for Auto Safety requested disclosure under FOIA of the names and addresses of individuals who had complained to the National Highway Traffic Safety Administration (NHTSA) about auto safety problems. The Center for Auto Safety argued that the government agency's summaries of complaints were not sufficient, because the group needed to contact the complainants individually. (*Center for Auto Safety*, *supra*, 809 F. Supp. at p. 149.)

The court upheld NHTSA's refusal to disclose the names and addresses of the complainants, on grounds of the public interest in the rights of citizens to complain to their government in privacy and to be left alone. (*Center for Auto Safety*, *supra*, 809 F. Supp. at p. 150.) The court concluded, "Since the consequences of a general mailing list of complainants concerned with auto safety are clearly and foreseeably intrusive, complainants will have forfeited a degree of privacy because they chose to alert the proper agency of government to circumstances suggesting tighter auto safety controls . . . a specialized list [of complainants], by its very nature, will be used by individuals and concerns that do not necessarily share the same concerns of [\*\*\*29] those listed but see a commercial or private advantage in exploiting them." (*Id.* at p. 149.) Further, the court found that no ascertainable public interest would be served by disclosure of the identities of the auto safety complainants, and therefore the public interest in disclosure was outweighed by the privacy interests of the complainants. (*Id.* at p. 150.)

As discussed below, application of the balancing test in the present case also compels the conclusion that the public interest in protecting the privacy interests of the complainants outweighs the public interest in disclosure.

[\*1022] D. *The Public Interest in Nondisclosure of Airport Noise Complainants' Personal Information Clearly Outweighs the Public Interest in Disclosure Under the Particular Facts of This Case*

(5) While no appellate courts have addressed the issue of whether a city must disclose the names, addresses, and telephone numbers of airport noise complainants, the California Attorney General has issued an opinion on the issue. (78 Ops.Cal.Atty.Gen. 103 (1995).) Utilizing the balancing test for the section 6255 catchall exception, the Attorney General concluded, [\*\*\*30] "... the names, addresses and telephone numbers of persons who have filed noise complaints concerning the operations of a city airport are subject to public disclosure unless the city can establish in the particular circumstances that the public interest served by not making the information public clearly outweighs the public interest served by disclosure." (78 Ops.Cal.Atty.Gen., *supra*, at p. 110.) We agree that [HN15] disclosure of the names, addresses, and telephone numbers of airport noise complainants [\*\*563] is determined by application of the section 6255 balancing

test.

City contends that the trial court erred in ordering disclosure, because City prevails when the *section 6255* balancing test is properly applied. In City's view, the public interest in protecting airport noise complainants' privacy outweighs the Mercury News's argument that disclosure is in the public interest. While City acknowledges that there is a keen public interest in airport noise, City asserts that disclosure of complainants' personal information will not assist the public to determine if City is properly [\*\*\*31] performing its state-mandated noise monitoring functions. Instead, City believes that its ability to perform its duties with respect to airport noise will be harmed by disclosure of complainants' identities, because, as shown by the activities and correspondence of groups such as Aircraft Pilots, disclosure will have a chilling effect and reduce the number of complaints.

In opposition, the Mercury News argues two main points: (1) City has not met its burden to show a clear overbalance on the side of confidentiality; and (2) City's arguments of a chilling effect on citizen complaints are based on speculation, as City lacks evidence of any citizen actually being harassed or deterred from making a complaint as a result of the disclosure of his or her name, address, and telephone number. Specifically, the Mercury News argues that airport noise is a matter of important public interest, and the public is entitled to determine whether city is meeting its obligations under state law to handle airport noise complaints. According to the Mercury News, it is only by obtaining the identity of airport noise complainants that the public and the media can ascertain whether city officials are performing [\*\*\*32] their duties, since "the validity of those complaints cannot be evaluated because secrecy prevents contact of complainants in order to verify the [1023] complaints and learn more about their concerns. The dry statistics offered by the City are not enough. The public is entitled to raw data, i.e., information that can be confirmed through interviews and observation."

Additionally, the Mercury News contends that the public would benefit from disclosure of complainants' identity, because disclosure would deter false or frivolous complaints. The Mercury News asserts as well that the complainants' privacy interest is minimal because complainants provide their names, addresses, and telephone numbers voluntarily and without any

guarantees of confidentiality.

In response, City contends that the Mercury News's own arguments reveal that disclosure of the identity of airport noise complainants will have a chilling effect on complaints, because the newspaper's purpose in obtaining their identity is to contact complainants directly. According to City, citizens who wish to make an airport noise complaint will have no choice but "to remain silent while maintaining their privacy, or else [\*\*\*33] register their complaints at the risk of being questioned in their homes by the press or other persons as to whether they are telling the truth." Also, City points out that the Mercury News has alternative means of contacting airport noise complainants other than by invading their privacy. City suggests that the newspaper could contact and interview complainants by locating them at city council meetings, through anti-airport noise community groups and their Web sites, or by canvassing the city areas in which noise complaints are most concentrated.

We agree with City that, applying the *section 6255* balancing test to the particular facts of this case, the public interest in the nondisclosure of airport complainant's personal information clearly outweighs the public interest in disclosure. Therefore, the trial court erred in ordering City to disclose the names, addresses, and telephone numbers of the January 1998 airport noise complainants. In so ruling, we recognize the Mercury News's argument that it is in the public interest for the [\*\*564] newspaper to be able to contact the complainants individually in order to confirm that their complaints have been properly recorded and reported [\*\*\*34] by City as required by its state noise variance. We also understand the Mercury News's implied argument that City may be motivated to underreport airport noise complaints and thereby prevent any negative impact on airport expansion.

However, in this particular case, City discloses a substantial amount of detailed information about public complaints of airport noise. This information provides the public with data to analyze City's performance of its duty to record, investigate and report airport noise complaints. We also find that airport noise complainants have a significant privacy interest in their names, [1024] addresses, and telephone numbers as well as in the fact that they have made a complaint to their government, and that disclosure of this information would have a chilling effect on future complaints.

74 Cal. App. 4th 1008, \*1024; 88 Cal. Rptr. 2d 552, \*\*564;  
1999 Cal. App. LEXIS 822, \*\*\*34; 99 Cal. Daily Op. Service 7470

Courts have not required evidence that an individual was actually deterred from making a complaint by the prospect of public disclosure. Instead, courts have based their recognition of the likely effect of disclosure on human experience. (See, e.g., *Black Panther Party*, *supra*, 42 Cal. App. 3d at p. 653 ["The prospect of public exposure discourages complaints. [\*\*\*35] "]; *Times-Mirror*, *supra*, 53 Cal. 3d at p. 1345 ["To disclose every private meeting or association of the Governor and expect the decisionmaking process to function effectively, is to deny human nature and contrary to common sense and experience." (italics omitted)]; *Center for Auto Safety*, *supra*, 809 F. Supp. at p. 149 ["[T]he consequences of a general mailing list of complainants concerned with auto safety are clearly and foreseeably intrusive."]) Therefore, "... like the United States Supreme Court, our perception that 'those who expect public dissemination of their remarks may well temper candor with a concern for appearance,' is based upon 'human experience' . . . ." (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal. App. 4th 159, 173 [78 Cal. Rptr. 2d 847], quoting *United States v. Nixon* (1974) 418 U.S. 683, 705 [94 S. Ct. 3090, 3106, 41 L. Ed. 2d 1039].)

Accordingly, it may be fairly inferred, on the basis of human experience, that it is likely that public disclosure of airport complainants' names, addresses and telephone numbers will have a chilling effect on the number of complaints made. Public [\*\*\*36] disclosure will subject the complainants to the loss of confidentiality in their complaints, and also to direct contact by the media and by persons who wish to discourage complaints. It also may be presumed that a reduction in airport noise complaints will impede City in its ability to comply with its airport noise monitoring duties.

In contrast, the public interest in disclosure of personal information about airport noise complainants is minimal, because City has made available all the information it has concerning airport noise complaints, except for the names, addresses, and telephone numbers of the complainants. The information provided by City in its monthly noise report and data base printout is extensive, and indicates the date, time and nature of each complaint, as well as the city area where the complaint originated. Not only does the monthly noise report provide a comprehensive overview of City's performance of its state-mandated duty to report airport noise complaints, the report also provides the Mercury News with information which will aid it in further investigation

of the complaints.

As City notes, the Mercury News has alternative means of contacting and interviewing [\*\*\*37] the complainants other than by intruding on their privacy [\*1025] through forced disclosure of their identities from government records. The newspaper may directly contact complainants who have made their identities public, for example, by appearing at city council meetings, by joining anti-airport noise community groups, or by disclosing themselves on the [\*\*565] group's Web site. The Mercury News may also identify from the monthly noise reports those neighborhoods from which complaints originate, and canvass those neighborhoods for complainants who are willing to be interviewed.

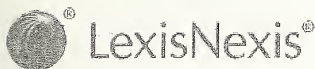
We recognize that a mailing and telephone list of airport complainants would greatly facilitate the Mercury News's investigation. However, facilitating research is not the purpose of public access to government records. (See *Reporters Committee*, *supra*, 489 U.S. at p. 772 [109 S. Ct. at p. 1481].) While media research may serve the public interest by accessing public records which show how the government conducts its business, investigations at the expense of individual privacy cannot be allowed for the sole purpose of media convenience. Where, as here, the media and members [\*\*\*38] of the public can obtain the identity of complainants through less intrusive means, disclosure of complainants' personal information is likely to chill future complaints. Because alternative information is available regarding the city's complaint-related operations, the public interest in protecting the privacy of complainants clearly outweighs the public interest in disclosure of their names, addresses and telephone numbers from government records.

#### IV. DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to vacate its amended order and judgment of September 24, 1998, and to enter a new and different order denying the San Jose Mercury News's petition for writ of mandate. Each party is to bear its own costs in this original proceeding.

Prémo, J., and Elia, J., concurred.

The petition of real party in interest for review by the Supreme Court was denied December 1, 1999. Mosk, J., was of the opinion that the petition should be granted.



## LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. SCHMIDT.

No. 178.

## SUPREME COURT OF THE UNITED STATES

177 U.S. 230; 20 S. Ct. 620; 44 L. Ed. 747; 1900 U.S. LEXIS 1792

Argued March 12, 13, 1900.

April 9, 1900, Decided

## PRIOR HISTORY: ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

THE three corporations directly or indirectly involved in this controversy are the Northern Division of the Cumberland and Ohio Railroad Company, the Louisville, Cincinnati and Lexington Railway Company and the Louisville and Nashville Railroad Company. In order to abbreviate we shall refer to them respectively as the Cumberland and Ohio, the Cincinnati and Lexington and the Louisville and Nashville.

On July 2, 1879, the Cumberland and Ohio mortgaged its road to secure its certain negotiable bonds.

On July 28, 1879, the Cumberland and Ohio leased its road for thirty years to the Cincinnati and Lexington. The lease provided that if the earnings of the Cumberland and Ohio proved inadequate to pay the interest on the bonds, secured by the mortgage above referred to, the lessee, the Cincinnati and Lexington, would "supply the deficiency so far as it may be done by appropriating the net earnings, or so much as may be needed, on its own lines, which may accrue by reason of business coming to it from or over said first party's line." The lease provided that the lessee, the Cincinnati and Lexington, should not assign the contract without the consent of the lessor, the Cumberland and Ohio. Contemporaneously with the execution of the lease and in order to secure the carrying out of the stipulation providing for the application of certain stated earnings of the Cincinnati and Lexington to the payment of the interest on the bonds of the

Cumberland and Ohio, the former corporation executed a mortgage in favor of the bondholders of the Cumberland and Ohio, hypothecating the net earnings on the Cincinnati and Lexington arising from business coming from the leased line. Although the Cumberland and Ohio did not abandon its corporate life and preserved its formal existence, all its railroad and appurtenances as a result of the lease passed from its own to the control of the Cincinnati and Lexington.

In November, 1881, the Cincinnati and Lexington conveyed all its property to the Louisville and Nashville, and made to the latter an assignment of the lease of the property of the Cumberland and Ohio. Despite the fact that the assignment of the lease was not approved by the original lessor, the Cumberland and Ohio, as provided in the lease, the Louisville and Nashville took control of both the roads of the Cincinnati and Lexington and Cumberland and Ohio, and operated the same, reaping all the revenues of every kind arising therefrom. In 1885, default having supervened in the payment of the interest on the bonds of the Cumberland and Ohio, issued and secured as above stated, the trustee under the mortgage commenced proceedings against the Cincinnati and Lexington to enforce the mortgage on net earnings derived from business of the Cumberland and Ohio. It is not denied that at the time the action was commenced the fact of the transfer of the property of the Cincinnati and Lexington and the assignment of the lease of the Cumberland and Ohio to the Louisville and Nashville was known to the trustee. However, the Cincinnati and

Lexington was the only party made defendant. The relief sought was a discovery of the amount of net earnings, derived from business coming from the Cumberland and Ohio, and a decree for the amount, when ascertained, for the benefit of the mortgage bondholders. A most protracted and hotly contested lawsuit ensued. The question of earnings coming to the Cincinnati and Lexington from business over the Cumberland and Ohio was thoroughly explored by reports, expert examination of books, testimony, etc., resulting in what is denominated by counsel for the plaintiff in error in their brief as a "wilderness of figures." At last a final decree was entered fixing the earnings which under the contract were attributable to the mortgage creditors of the Cumberland and Ohio, at the sum of \$53,565.62, which the defendant was ordered to pay into court with interest by a day stated. The sum not having been paid a rule was taken on the defendant to compel performance, and in response it was answered:

"That in 1881 it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges and franchises except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets or funds of any kind with which to comply with the order of this court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it."

The sale referred to in this answer being that which had been made by the Cincinnati and Lexington of all its property, including the assignment of the lease held by it from the Cumberland and Ohio to the Louisville and Nashville. In reply to a rule taken on the defendant to report the amount of net earnings which had accrued subsequent to the period embraced by the decree for \$53,565.62, the defendant said:

"States and shows to this court that it has not made any net earnings, or earnings of any kind, since the date aforesaid, on business coming to it from or over the Cumberland and Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid."

Thereupon the plaintiff sought leave by an amended and supplemental petition to make the Louisville and Nashville a party defendant to the cause. Among others

the following averments were contained in the petition:

"Plaintiffs state that prior thereto the said Louisville and Nashville Railroad Company had purchased and acquired and at the time of said conveyance held the capital stock of the said Louisville, Cincinnati and Lexington Railway Company, and as such stockholder took and appropriated and has ever since enjoyed the whole purchase price of the Louisville, Cincinnati and Lexington Railway Company and all its said properties.

"Plaintiffs state that after the execution of said deed of November 1, 1881, said Louisville and Nashville Railroad Company took possession of all the property of the Louisville, Cincinnati and Lexington Railway Company aforesaid and of the property leased, as aforesaid, to said company, including the Northern Division of the Cumberland and Ohio Railroad Company aforesaid, and began to operate and has ever since operated said railroads and properties and taken and appropriated to its own use the earnings thereof.

"Plaintiffs state that at all times since November 1, 1881, said Louisville and Nashville Railroad Company, subject to and in accordance with the provisions of said lease and mortgage and by virtue thereof, has operated the said Northern Division of the Cumberland and Ohio Railroad and the said Louisville, Cincinnati and Lexington Railway and properties, and has made all the earnings mentioned and proved in the reports of the several commissioners in this case, and ascertained and adjudged in the several judgments of this court, and finally adjudged in the opinion and judgment of the Court of Appeals herein, all of which said earnings were spoken of by witnesses and by the courts aforesaid in said reports and judgments respectively as the earnings of the Louisville, Cincinnati and Lexington Railway Company.

"Plaintiffs further state that the Louisville and Nashville Railroad Company at the time of its aforesaid purchase of the railroad and properties of the Louisville, Cincinnati and Lexington Railroad Company actually knew all the provisions of the lease, mortgages and contracts set up in the original petition in this suit, and actually applied net earnings accruing from said operation of said properties therein referred to, in accordance with said lease, mortgages and contracts, from the time of its said purchase until the 1st day of April, 1883, and knew at all times, including the time during which this action has been pending, that it had operated said railroad and all the other property of said

Louisville, Cincinnati and Lexington Railway Company, and of the Northern Division of the Cumberland and Ohio Railroad Company, and that it had received all the earnings which were made by said properties, and understood and recognized that the earnings mentioned in the petition referred to the earnings made in the operation of the railroad and properties of the Louisville, Cincinnati and Lexington Railway Company and the Northern Division of the Cumberland and Ohio Railroad Company, and filed the answer in this case in the name of the Louisville, Cincinnati and Lexington Railway Company, and filed all other papers which were filed herein on behalf of the defence, and itself employed counsel in this case to make defence in the name of the Louisville, Cincinnati and Lexington Railway Company, and introduced all the witnesses who were introduced on behalf of the defence of this action, and has been in court defending this action and has controlled the defence thereof continuously from the time the summons on the original petition was served in this case on Milton H. Smith, who was its president, on the -- day of --, 1885, and from the time the said Louisville and Nashville Railroad Company caused the answer to said petition to be filed herein on the -- day of --, 1886."

The leave to file was denied on the ground that it was too late to do so after judgment. This order, refusing to allow the amendment, was affirmed by the Court of Appeals of the State of Kentucky. That court, however, in its opinion intimated that the amendment was not necessary if the averments of the supplemental and amended petition were true, and that under the facts the Louisville and Nashville might be proceeded against by rule to show cause. *99 Kentucky, 143*. Following the path thus pointed out by the Court of Appeals, a rule in the lower court was applied for to compel the Louisville and Nashville to pay the amount of the judgment. The court considered the suggestion which had been made, in the opinion of the Court of Appeals, as not binding on it, and hence declined to allow the rule on the ground that the Louisville and Nashville not having been named as a defendant in the proceeding could not be by rule condemned to pay the judgment. The Court of Appeals reversed the order of the trial court and directed the rule to issue as prayed for. The court in effect held that as the affidavit by which the rule was supported in substance charged that the Louisville and Nashville prior to and during the entire suit had operated the roads from which the revenues accrued which were in controversy, and that that corporation had in substance volunteered in the cause

to defend the same in the name of the technical defendant; had carried on the defence through its own counsel, had paid all the expenses of the litigation; the officers of the corporation which was technically a defendant being the officers of the Louisville and Nashville, therefore, the Louisville and Nashville had had under the laws of Kentucky due notice of the suit, and ample opportunity to defend, in fact had actually carried on the defence, and could hence be condemned by rule to pay the judgment. The trial court thereupon entertained and issued the rule, which was served on the Louisville and Nashville. That corporation for answer to the rule said, among other things:

First. "That it is not a party to this suit. It has not been named in any pleading in the case as a party, and there is no averment made in any pleading in the case against this respondent, or that is applicable to this respondent, and no judgment or order has ever been entered in this case against this respondent, and no process has ever issued against or ever been served on this respondent."

Second. "There has never been a time from the institution of this suit up to this time when this respondent could, with propriety, have filed an answer setting up its defences against the alleged claim of the plaintiff, and to require it now to pay into court upon this rule the amount stated in the rule, or any other amount, would be to deprive this respondent of its property without due process of law, contrary to the Constitution of the United States in such cases made and provided."

The answer then pleaded a set-off to the amount of \$16,524.37, which it was claimed the Louisville and Nashville should be allowed if it was held bound to pay the judgment. The conclusion of the answer was as follows: "Wherefore having fully responded, this respondent prays that the rule herein be discharged." The court, having expressed in a careful opinion its view that the Louisville and Nashville could not be condemned, by rule, because it had not been a technical party to the record, nevertheless, considering itself bound by the action of the Court of Appeals, made the rule absolute, and entered a decree against the Louisville and Nashville Railroad, condemning it to pay the judgment, subject to the set-off which had been pleaded in the answer to the rule, and this judgment was affirmed by the Court of Appeals of the State of Kentucky as a delay case. By an allowance of a writ of error the cause is now here for

review.

LexisNexis(R) Headnotes

*Civil Procedure > Pleading & Practice > Defenses,  
Demurrers & Objections > General Overview*  
*Civil Procedure > Pleading & Practice > Pleadings >  
Rule Application & Interpretation*

*Civil Procedure > Eminent Domain Proceedings >  
Notices*

[HN1] The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend.

*Civil Procedure > Pleading & Practice > Pleadings >  
Rule Application & Interpretation*

[HN2] Whether in fact an individual has a defense is not important. To assume that he has none, and therefore that he is not entitled to a day in court, is to assume against him the very point he may wish to contest. Manifestly, the principle can have no application to a case where there was notice.

LAWYERS' EDITION HEADNOTES:

Constitutional law -- due process of law -- bringing in defendant after judgment -- order to show cause as due process of law. --

Headnote:

1. The rendition of a judgment against one who was not served with process in the action or named as a party until after the original judgment was rendered, but was brought in subsequent thereto by an order to show cause, and condemned to pay the judgment, was not in violation of the provision as to due process of law in *U. S. Const. 14th Amend.*, where such party had voluntarily appeared in the cause and actively conducted the defense.

2. The mere fact that a proceeding to hold a party liable to a judgment is by rule to show cause does not

conflict with due process under *U. S. Const. 14th Amend.*, for forms of procedure in the state courts are not controlled by that amendment, provided the fundamental rights secured by the amendment are not denied.

3. One who actually appeared and made a defense in an action to which he was not technically a party cannot contend that, when he was brought in by rule to show cause after the judgment was rendered, and was condemned to pay it, he was denied due process of law because all right to defend had been cut off by the previous judgment, if he offered no defense which the court did not entertain.

SYLLABUS

The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein; and all its requirements are complied with provided that in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend.

The mere fact that in this case the proceeding to hold the Louisville and Nashville Company liable was by rule does not conflict with due process under the *Fourteenth Amendment*, since forms of procedure in state courts are not controlled by that amendment, provided the fundamental rights secured by the amendment are not denied.

Although the Louisville and Nashville Company appeared in response to the rule, pleaded its set-off, and declared that its answer constituted a full response, no defence personal to itself of any other character except the set-off was pleaded or suggested in any form, and this court cannot be called upon to conjecture that defences existed which were not made, and to decide that proceedings in a state court have denied due process of law because defences were denied when they were not prosecuted.

COUNSEL: Mr. Helm Bruce and Mr. James P. Helm for plaintiff in error. Mr. H. W. Bruce was on their brief.

Mr. John G. Simrall and Mr. Edmund F. Trabue for defendant in error. Mr. Temple Bodley, Mr. John C. Doolan, Mr. Benjamin F. Washer and Mr. James S. Pirtle were on their brief.

OPINION BY: WHITE

OPINION

[\*236] [\*622] [\*\*\*750] MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

It is no longer open to contention that [HN1] the *due process clause of the Fourteenth Amendment to the Constitution of the United States* does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. *Iowa Central Railway v. Iowa*, 160 U.S. 389; *Wilson v. North Carolina*, 169 U.S. 586.

[\*237] The claim of the plaintiff in error (the Louisville and Nashville) is that the decree rendered against it did not constitute due process of law, first, because it had no notice of the suit, it not having been summoned as a party defendant; and, second, that as it was not made a nominal party defendant and served with process as such, it had no adequate opportunity to make defence. In support of the second contention various provisions of the Kentucky law have been referred to in the argument, from which it is deduced that the Louisville and Nashville would have been without right in the proceeding brought, not against it, but against the Cincinnati and Lexington, to make defences which may have appertained and been relevant to the Louisville and Nashville, and might not have related to the Cincinnati and Lexington, the party defendant on the record. But the answer to these contentions is that the necessary effect of the opinion and decree of the court of last resort of Kentucky, is to hold, first, as a matter of fact, that, although not a technical defendant, the Louisville and Nashville became voluntarily, in the name of the Cincinnati and Lexington, the real, although not the nominal, defendant in the cause, and during the long years of this protracted litigation was in legal effect an actor in the courts of Kentucky seeking, by every possible means, to defeat the claim of the plaintiff. The conclusions of fact found by the court of last resort of Kentucky are not subject to reexamination by this court. Clearly, also, the inevitable result of the conclusion of the Court of Appeals of Kentucky is that it was the duty of the Louisville and Nashville, having come in voluntarily

in the cause to defend its interest, under the name of the technical [\*\*\*623] defendant, if it had defences which were personal to itself, to have made such an appearance on its own behalf as to enable it to make them, and that the statutes of Kentucky not only authorized this course, but obliged the Louisville and Nashville to have followed it. Accepting as we do the interpretation placed by the courts of last resort of Kentucky on the law of that State, the contention of the plaintiff in error is at once demonstrated [\*\*\*751] to be without merit. Besides the conclusiveness of what we have just said, there is another view which is equally decisive. The record shows no offer of any defence whatever, by [\*238] the Louisville and Nashville, which was refused by the courts below. On the contrary, every defence made is shown to have been entertained, fully considered and to have been ultimately decided. The argument then reduces itself to this: That one who has voluntarily appeared in a cause and actively conducted the defence is to be held to have been denied, by the courts of the State, the right to make a defence which was never presented. Moreover, even if we put out of view altogether all the proceedings had in the original cause during the many years when the suit was pending, and confine our attention solely to the events which took place after the application for the rule to show cause, on the Louisville and Nashville, the same conclusion is rendered necessary. It is undoubted that the Louisville and Nashville was made a party defendant to the rule in the most technical sense, and was actually served. It made answer and asserted its set-off. The mere fact that the proceeding to hold it liable was by rule does not conflict with due process under the *Fourteenth Amendment*, for, as we have seen, forms of procedure in the state courts are not controlled by the *Fourteenth Amendment*, provided the fundamental rights secured by the amendment are not denied. But it is argued whilst it is true the effort by rule to enforce responsibility for the judgment did not violate the *Fourteenth Amendment*, and service of the rule was adequate notice, yet no opportunity to defend was afforded, because all right to defend had been cut off by the previous judgment. In effect it is asserted the rule summoned the corporation to show cause why it should not pay a judgment to which, under the previous decree, there was no right on its part to make any defence whatever. In other words, it is said the right to proceed by rule was upheld by the Kentucky court because the Louisville and Nashville was bound by the judgment and therefore the rule rested on an assumption which precluded the setting up of any defence to it. But the answer to this argument is plain. Although

the Louisville and Nashville appeared in response to the rule, pleaded its set-off, and declared that its answer constituted a full response, no defence personal to itself of any other character, except the set-off, was pleaded or suggested in any form whatever. The argument, therefore, [\*239] asks us to say that the Louisville and Nashville in the proceeding in which it was duly served, and to which it responded and as to which it had its day in court, was deprived of defences which it never asserted, and that due process of law was not administered to it because it was unheard in respect to matters concerning which it made no claim. But this court cannot be called upon to conjecture that defences existed which were not made and to decide that proceedings in a state court have denied due process of law because defences were denied, when they were not presented. And especially must that be so where the court of last resort of the State, on review of all the

proceedings, has held that full opportunity to make every defence was afforded. True it is that in *Rees v. City of Watertown*, 19 Wall. 107, 123, it was said: [HN2] "Whether in fact the individual has a defence . . . is not important. To assume that he has none, and therefore that he is not entitled to a day in court, is to assume against him the very point he may wish to contest." But this truism was stated with reference to a case where it was argued that a condemnation without notice could be justified on the assumption that if notice had been given no defence could have been made. Manifestly, the principle can have no application to a case where there was notice, and the presumption which we are asked to invoke is that although no defences were pressed they may have possibly existed.

Affirmed.



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MULLANE, SPECIAL GUARDIAN, v. CENTRAL HANOVER BANK & TRUST  
CO., TRUSTEE, ET AL.

No. 378

## SUPREME COURT OF THE UNITED STATES

339 U.S. 306; 70 S. Ct. 652; 94 L. Ed. 865; 1950 U.S. LEXIS 2070

February 8, 1950, Argued

April 24, 1950, Decided

PRIOR HISTORY: APPEAL FROM THE COURT  
OF APPEALS OF NEW YORK.

Overruling objections to the statutory notice to beneficiaries by publication authorized by § 100-c of the *New York Banking Law*, a New York Surrogate's Court entered a final decree accepting an accounting of the trustee of a common trust fund established pursuant to that section. 75 N. Y. S. 2d 397. This decree was affirmed by the Appellate Division of the Supreme Court of New York (see 274 App. Div. 772, 80 N. Y. S. 2d 127) and the *Court of Appeals of New York* (299 N. Y. 697, 87 N. E. 2d 73). On appeal to this Court, reversed, p. 320.

DISPOSITION: 299 N. Y. 697, 87 N. E. 2d 73, reversed.

## LexisNexis(R) Headnotes

*Banking Law > Bank Activities > Bank Accounts > Trust Accounts > General Overview*

[HN1] See *N.Y. Banking Law § 100-c(12)*.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection Estate, Gift & Trust Law > Trusts > Modification & Termination*

[HN2] Whatever the technical definition of its chosen

procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection* [HN3] The fundamental requisite of due process of law is the opportunity to be heard.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection* [HN4] An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

339 U.S. 306, \*; 70 S. Ct. 652, \*\*;  
94 L. Ed. 865, \*\*\*; 1950 U.S. LEXIS 270

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection* [HN5] When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection* [HN6] Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

#### SUMMARY:

A New York statute which permits trust companies to pool small trust estates into one common fund for investment administration also provides for notice, to interested beneficiaries, of a petition of such trust company for judicial settlement of its accounts by publication in a local newspaper, setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts, or funds.

A majority of the Supreme Court, consisting of seven of the Justices, held, in an opinion by Jackson, J., that the statutory provision for notice is not subject to due process objections in so far as it concerns beneficiaries whose interests or addresses are unknown to the trustee, but is subject to such objections as regards beneficiaries whose whereabouts and interests are known. It was also stated that notice by mail would be sufficient.

Burton, J., dissented, expressing the view that whether or not further notice to beneficiaries should supplement the statutory notice and representation is properly within the discretion of the state.

Douglas, J., did not participate.

#### LAWYERS' EDITION HEADNOTES:

\*\*\*[LEdHN1]

#### CONSTITUTIONAL LAW, §786

necessity of notice and hearing -- as depending upon distinctions between actions in rem and those in personam. --

Headnote:[1]

The due process requirements of the *Fourteenth Amendment* as regards notice and hearing do not depend upon a distinction between actions in rem and those in personam, however useful such a distinction may be in many branches of the law, or on other issues.

\*\*\*[LEdHN2]

#### CONSTITUTIONAL LAW, §778.5

due process -- power to close trusts -- as against nonresidents. --

Headnote:[2]

In providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts, a state has power to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

\*\*\*[LEdHN3]

#### CONSTITUTIONAL LAW, §786

due process -- necessity of notice and hearing. --

Headnote:[3]

The due process clause requires at a minimum that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

\*\*\*[LEdHN4]

#### CONSTITUTIONAL LAW, §803.5

due process -- notice and hearing -- settlement of trust accounts. --

Headnote:[4]

Proceedings for the judicial settlement of accounts of a trust company which has established a common trust fund under state law permitting the pooling of small trust estates into one fund for investment administration, must measure up to the standards of due process, as regards notice and hearing.

\*\*\*LEdHNS]

#### CONSTITUTIONAL LAW, §788.5

due process -- personal service within jurisdiction. --

Headnote:[5]

Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding to satisfy the requirements of due process.

\*\*\*LEdHN6]

#### CONSTITUTIONAL LAW, §790

due process -- constructive service. --

Headnote:[6]

The Supreme Court of the United States has not committed itself to any formula determining when constructive notice may be utilized, or what test it must meet, to satisfy the requirements of due process.

\*\*\*LEdHN7]

#### CONSTITUTIONAL LAW, §787

due process -- sufficiency of notice. --

Headnote:[7]

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

\*\*\*LEdHN8]

#### CONSTITUTIONAL LAW, §787

sufficiency of notice -- criterion. --

Headnote:[8]

The criterion whether a statutory provision for notice meets the requirements of due process is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.

\*\*\*LEdHN9]

#### CONSTITUTIONAL LAW, §787

due process -- sufficiency of notice. --

Headnote:[9]

When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness, and hence the constitutional validity, of any statutory method of notice may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions preclude reasonable certainty of actual receipt of notice, that the form chosen is not substantially less likely to bring home notice than others of the feasible and customary substitutes.

\*\*\*LEdHN10]

#### CONSTITUTIONAL LAW, §790

due process -- service by publication. --

Headnote:[10]

In an appropriate case the due process requirement of notice may be satisfied by service by publication as notification supplemental to other action which in itself may reasonably be expected to convey a warning.

\*\*\*LEdHN11]

#### CONSTITUTIONAL LAW, §790

due process -- service by publication -- settlement of trust accounts. --

Headnote:[11A][11B]

A statutory provision for notice, by publication in a local newspaper, of a petition for judicial settlement of its accounts filed by a trust company which has established a common trust fund under state law permitting the pooling of small trust estates into one fund for investment administration, satisfies the due process requirement of notice in regard to beneficiaries whose interests or whereabouts cannot be ascertained with due diligence by the trust company, even though the statute requires only a publication setting forth the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds. On the other hand, while as regards beneficiaries whose whereabouts and interests are known to the trust company notice by mail would be sufficient, due process is not afforded to them by the statutory notice by publication.

[\*\*\*LEdHN12]

## NOTICE, §3

sufficiency of personal service without jurisdiction.

Headnote:[12]

Personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack.

## SYLLABUS

A trust company in New York which had exclusive management and control of a common trust fund established by it under § 100-c of the *New York Banking Law* petitioned under that section for a judicial settlement of accounts which would be binding and conclusive as to any matter set forth therein upon everyone having any interest in the common fund or in any participating trust. In this common fund the trust company had invested assets of numerous small trusts of which it was trustee and of which some of the beneficiaries were residents and some nonresidents of the State. The only notice of this petition given beneficiaries was by publication in a local newspaper pursuant to § 100-c (12). *Held*:

1. Whether such a proceeding for settlement of accounts be technically in *personam*, in *rem*, or *quasi in*

*rem*, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is such as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard. Pp. 311-313.

2. The statutory notice by publication is sufficient as to any beneficiaries whose interests or addresses are unknown to the trustee, since there are no other means of giving them notice which are both practicable and more effective. Pp. 313-318.

3. Such notice by publication is not sufficient under the *Fourteenth Amendment* as a basis for adjudication depriving of substantial property rights known persons whose whereabouts are also known, since it is not impracticable to make serious efforts to notify them at least by ordinary mail to their addresses on record with the trust company. Pp. 318-320.

COUNSEL: Kenneth J. Mullane argued the cause and filed a brief for appellant.

Albert B. Maginnes argued the cause for the Central Hanover Bank & Trust Co., appellee. With him on the brief was J. Quincy Hunsicker, 3rd.

James N. Vaughan submitted on brief for Vaughan, appellee.

Peter Keber and C. Alexander Capron filed a brief for the New York State Bankers Association, as amicus curiae, urging affirmance.

JUDGES: Vinson, Black, Reed, Frankfurter, Jackson, Burton, Clark, Minton; Douglas took no part in the consideration or decision of this case.

## OPINION BY: JACKSON

## OPINION

[\*307] [\*\*654] [\*\*\*869] MR. JUSTICE JACKSON delivered the opinion of the Court.

This controversy questions the constitutional sufficiency of notice to [\*\*\*870] beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York

339 U.S. 306, \*307; 70 S. Ct. 652, \*\*654;  
94 L. Ed. 865, \*\*\*870; 1950 U.S. LEXIS 2070

Banking Law. The New York Court of Appeals considered and overruled objections that the statutory notice contravenes requirements of the *Fourteenth Amendment* and that by allowance of the account beneficiaries were deprived of property without due process of law. 299 N. Y. 697, 87 N. E. 2d 73. The case is here on appeal under 28 U. S. C. § 1257.

Common trust fund legislation is addressed to a problem appropriate for state action. Mounting overheads have made administration of small trusts undesirable to corporate trustees. In order that donors and testators of moderately sized trusts may not be denied the service of corporate fiduciaries, the District of Columbia and some [\*308] thirty states other than New York have permitted pooling small trust estates into one fund for investment administration. \* The income, capital gains, losses and expenses of the collective trust are shared by the constituent trusts in proportion to their contribution. By this plan, diversification of risk and economy of management can be extended to those whose capital standing alone would not obtain such advantage.

\* *Ala. Code Ann.*, 1940, Cum. Supp. 1947, tit. 58, §§ 88 to 103, as amended, Laws 1949, Act 262; *Ariz. Code Ann.*, 1939, Cum. Supp. 1949, §§ 51-1101 to 51-1104; *Ark. Stat. Ann.* 1947, §§ 58-110 to 58-112; *Cal. Bank. Code Ann.*, Deering, 1949, § 1564; *Colo. Stat. Ann.*, 1935, Cum. Supp. 1947, c. 18, §§ 173 to 178; *Conn. Gen. Stat.* 1949 Rev., § 5805; *Del. Rev. Code*, 1935, § 4401, as amended, Laws, 1943, c. 171, Laws 1947, c. 268; (D. C.) 63 Stat. 938; *Fla. Stat.*, 1941, §§ 655.29 to 655.34; *Ga. Code Ann.*, 1937, Cum. Supp. 1947, §§ 109-601 to 109-622; *Idaho Code Ann.*, 1949, Cum. Supp. 1949, §§ 68-701 to 68-701 to 68-703; *Ill. Rev. Stat.*, 1949, c. 16 1/2, §§ 57 to 63; *Ind. Stat. Ann.*, Burns, 1950, §§ 18-2009 to 18-2014; *Ky. Rev. Stat.*, 1948, § 287.230; *La. Gen. Stat. Ann.*, 1939, § 9850.64; *Md. Ann. Code Gen. Laws*, 1939, Cum. Supp. 1947, art. 11, § 62A; *Mass. Ann. Laws*, 1933, Cum. Supp. 1949, c. 203A; *Mich. Stat. Ann.*, 1943, §§ 23.1141 to 23.1153; *Minn. Stat.*, 1945, § 48.84, as amended, Laws 1947, c. 234; *N. J. Stat. Ann.*, 1939, Cum. Supp. 1949, §§ 17:9A-36 to 17:9A-46; *N. C. Gen. Stat.*, 1943, §§ 36-47 to 36-52; *Ohio Gen. Code Ann.* (Page, 1946) §§ 715 to 720, 722; *Okla. Stat.*, 1941, Cum. Supp. 1949, tit. 60, § 162; *Pa. Stat. Ann.*, 1939, Cum. Supp.

1949, tit. 7, §§ 819-1109 to 819-1109d; *So. Dak. Laws* 1941, c. 20; *Tex. Rev. Civ. Stat. Ann.*, 1939, Cum. Supp. 1949, art. 7425b-48; *Vt. Stat.*, 1947 Rev., § 8873; *Va. Code Ann.*, 1950, §§ 6-569 to 6-576; *Wash. Rev. Stat. Ann.*, Supp. 1943, §§ 3388 to 3388-6; *W. Va. Code Ann.*, 1949, § 4219(1) *et seq.*; *Wis. Stat.*, 1947, § 223.055.

Statutory authorization for the establishment of such common trust funds is provided in the *New York Banking Law*, § 100-c (c. 687, L. 1937, as amended by c. 602, L. 1943 and c. 158, L. 1944). Under this Act a trust company may, with approval of the State Banking Board, establish a common fund and, within prescribed limits, [\*309] invest therein the assets of an unlimited number of estates, trusts or other funds of which it is trustee. Each participating trust shares ratably in the common fund, but exclusive management and control is in the trust company as trustee, and neither a fiduciary nor any beneficiary of a participating trust is deemed to have ownership in any particular asset or investment of this common fund. The trust company must keep fund assets separate from its own, and in its fiduciary capacity may not deal with itself [\*655] or any affiliate. Provisions are made for accountings twelve to fifteen months after the establishment of a fund and triennially thereafter. The decree in each such judicial settlement of accounts is made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any participating estate, trust or fund.

In January, 1946, Central Hanover Bank and Trust Company established a common trust fund in accordance [\*\*\*871] with these provisions, and in March, 1947, it petitioned the Surrogate's Court for settlement of its first account as common trustee. During the accounting period a total of 113 trusts, approximately half *inter vivos* and half testamentary, participated in the common trust fund, the gross capital of which was nearly three million dollars. The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some of them were not residents of the State of New York.

The only notice given beneficiaries of this specific application was by publication in a local newspaper in strict compliance with the minimum requirements of *N. Y. Banking Law* § 100-c (12): [HN1] "After filing such petition [for judicial settlement of its account] the

339 U.S. 306, \*309; 70 S. Ct. 652, \*\*655;  
94 L. Ed. 865, \*\*\*871; 1950 U.S. LEXIS 2070

petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week [\*310] for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund." Thus the only notice required, and the only one given, was by newspaper publication setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds.

At the time the first investment in the common fund was made on behalf of each participating estate, however, the trust company, pursuant to the requirements of § 100-c (9), had notified by mail each person of full age and sound mind whose name and address were then known to it and who was "entitled to share in the income therefrom . . . [or] . . . who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice." Included in the notice was a copy of those provisions of the Act relating to the sending of the notice itself and to the judicial settlement of common trust fund accounts.

Upon the filing of the petition for the settlement of accounts, appellant was, by order of the court pursuant to § 100-c (12), appointed special guardian and attorney for all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund; and appellee Vaughan was appointed to represent those similarly interested in the principal. There were no other appearances on behalf of any one interested in either interest or principal.

[\*311] Appellant appeared specially, objecting that notice and the statutory provisions for notice to beneficiaries were inadequate to afford due process under the *Fourteenth Amendment*, and therefore that the court was without jurisdiction to render a final and binding decree. Appellant's objections were entertained and overruled, the Surrogate holding that the notice required and given was sufficient. 75 N. Y. S. 2d 397. A final decree accepting the accounts has been entered, affirmed

by the Appellate Division of the Supreme Court, 275 App. Div. 769, 88 N. Y. S. 2d 907, and by the Court of Appeals of the State of New York. 299 N. Y. 697, 87 N. E. 2d 73.

The effect of this decree, as held below, is to settle "all questions respecting [\*656] the management of the common fund." We understand that every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper [\*\*\*872] management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree. See *Matter of Hoaglund*, 194 Misc. 803, 811-812, 74 N. Y. S. 2d 156, 164, aff'd 272 App. Div. 1040, 74 N. Y. S. 2d 911, aff'd 297 N. Y. 920, 79 N. E. 2d 746; *Matter of Bank of New York*, 189 Misc. 459, 470, 67 N. Y. S. 2d 444, 433; *Matter of Security Trust Co. of Rochester*, id. 748, 760, 70 N. Y. S. 2d 260, 271; *Matter of Continental Bank & Trust Co.*, id. 795, 797, 67 N. Y. S. 2d 806, 807-808.

We are met at the outset with a challenge to the power of the State -- the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York. It is contended that the proceeding is one *in personam* in that the decree affects neither title nor possession of any *res*, but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust. Accordingly, it is said, under the strict doctrine of *Pennoy v. Neff*, 95 U.S. 714, the Surrogate [\*312] is without jurisdiction as to nonresidents upon whom personal service of process was not made.

Distinctions between actions *in rem* and those *in personam* are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own. Buckland and McNair, *Roman Law and Common Law*, 66; Burdick, *Principles of Roman Law and Their Relation to Modern Law*, 298. The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification. American courts have sometimes classed certain actions as *in rem* because personal service of process was not required, and at other times have held personal service of process not

required because the action was *in rem*. See cases collected in *Freeman on Judgments*, §§ 1517 *et seq.* (5th ed.).

\*\*\*LEdHR1 [1] \*\*\*LEdHR2 [2] Judicial proceedings to settle fiduciary accounts have been sometimes termed *in rem*, or more indefinitely *quasi in rem*, or more vaguely still, "in the nature of a proceeding *in rem*." It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both *in rem* and *in personam*. But in any event we think that the requirements of the *Fourteenth Amendment to the Federal Constitution* do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding [\*313] upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, [HN2] whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

\*\*\*LEdHR3 [3] Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words \*\*\*873 of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice \*\*657 and opportunity for hearing appropriate to the nature of the case.

\*\*\*LEdHR4 [4] In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their

names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

\*\*\*LEdHR5 [5] Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which [\*314] would place impossible or impractical obstacles in the way could not be justified.

Against this interest of the State we must balance the individual interest sought to be protected by the *Fourteenth Amendment*. This is defined by our holding that "[HN3] The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

\*\*\*LEdHR6 [6] The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

\*\*\*LEdHR7 [7] \*\*\*LEdHR8 [8] [HN4] An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457; *Grannis v. Ordean*, 234 U.S. 385; *Priest v. Las Vegas*, 232 U.S. 604; *Roller v. Holly*, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, *supra*, and it must afford a reasonable time for those interested to make their

appearance, *Roller v. Holly*, *supra*, and *cf. Goodrich v. Ferris*, 214 U.S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions [\*315] are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." [\*\*\*874] *American Land Co. v. Zeiss*, 219 U.S. 47, 67; and see *Blinn v. Nelson*, 222 U.S. 1, 7.

[\*\*\*LEdHR9] [9]But [HN5] when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *Hess v. Pawloski*, 274 U.S. 352, with *Wuchter v. Pizzutti*, 276 U.S. 13, [\*\*658] or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.

[\*316] [\*\*\*LEdHR10] [10]Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to

convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, *cf. Anderson National Bank v. Luckett*, 321 U.S. 233; *Security Savings Bank v. California*, 263 U.S. 282, or that he has left some caretaker under a duty to let him know that it is being jeopardized. *Ballard v. Hunter*, 204 U.S. 241; *Huling v. Kaw Valley R. Co.*, 130 U.S. 559. As phrased long ago by Chief Justice Marshall in *The Mary*, 9 *Cranch* 126, 144, "It is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it."

In the case before us there is, of course, no abandonment. On the other hand these beneficiaries do have a resident fiduciary as caretaker of their interest in this property. But it is their caretaker who in the accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so. Not [\*\*\*875] even the special guardian is required or apparently expected to communicate with his ward and client, and, of course, if such a duty were merely transferred [\*317] from the trustee to the guardian, economy would not be served and more likely the cost would be increased.

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. *Cunnius v. Reading School District*, 198 U.S. 458; *Blinn v. Nelson*, 222 U.S. 1; [\*\*659] and see *Jacob v. Roberts*, 223 U.S. 261.

Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be

ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee. Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary. We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the [\*318] name of due process. The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remaindermen, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages. These are practical matters in which we should be reluctant to disturb the judgment of the state authorities.

[\*\*LEdHR11A] [11A]Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. [HN6] Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at

least by ordinary mail to the record addresses. *Cf. Wuchter v. Pizzutti, supra*. Certainly sending them a copy of the statute months and perhaps years in advance does not answer [\*\*\*876] this purpose. The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests.

[\*\*LEdHR12] [12]We need not weigh contentions that a requirement of personal service of citation on even the large number of known resident or nonresident beneficiaries would, by [\*319] reasons of delay if not of expense, seriously interfere with the proper administration of the fund. Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack. However, no such service is required under the circumstances. This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any [\*\*660] objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done." *Blinn v. Nelson, supra, 7.*

The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

In some situations the law requires greater precautions in its proceedings than the business world

339 U.S. 306, \*319; 70 S. Ct. 652, \*\*660;  
94 L. Ed. 865, \*\*\*LEdHR12; 1950 U.S. LEXIS 2070

accepts for its own purposes. In few, if any, will it be satisfied with [\*320] less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald v. Mabey*, 243 U.S. 90, 91.

[\*\*\*LEdHR11B] [11B] We hold that the notice of judicial settlement of accounts required by the *New York Banking Law § 100-c (12)* is incompatible with the requirements of the *Fourteenth Amendment* as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property

rights. Accordingly the judgment is reversed and the cause remanded for further proceedings [\*\*\*877] not inconsistent with this opinion.

*Reversed.*

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

DISSENT BY: BURTON

DISSENT

MR. JUSTICE BURTON, dissenting.

These common trusts are available only when the instruments creating the participating trusts permit participation in the common fund. Whether or not further notice to beneficiaries should supplement the notice and representation here provided is properly within the discretion of the State. The Federal Constitution does not require it here.



LexisNexis®

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUVENILE MALE,  
 Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v.  
 JUVENILE MALE; Defendant-Appellant. UNITED STATES OF AMERICA,  
 Plaintiff-Appellee, v. JUVENILE MALE, Defendant-Appellant.

No. 09-30330, No. 09-30273, No. 09-30365

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

670 F.3d 999; 2012 U.S. App. LEXIS 1304

September 21, 2011, Argued and Submitted, San Francisco, California  
 January 25, 2012, Filed

SUBSEQUENT HISTORY: US Supreme Court  
 certiorari denied by *Juvenile v. United States*, 2012 U.S.  
 LEXIS 6621 (U.S., Oct. 1, 2012)

**PRIOR HISTORY: [\*\*1]**

Appeal from the United States District Court for the  
 District of Montana. D.C. No. 4:09-cr-00064-SEH-1.  
 District of Montana. D.C. No. 1:09-cr-00034-RFC-1.  
 District of Montana. Sam E. Haddon, District Judge,  
 Presiding. Appeal from the United States District Court  
 for the District of Montana. D.C. No.  
 4:09-cr-00071-SEH-1. District of Montana. Richard F.  
 Cebull, Chief District Judge, Presiding.

**DISPOSITION: AFFIRMED.**

LexisNexis(R) Headnotes

*Criminal Law & Procedure > Juvenile Offenders >  
 Sentencing > General Overview*

[HN1] A successful prosecution under the Federal  
 Juvenile Delinquency Act (FJDA), 18 U.S.C.S. § 5031 *et*  
*seq.*, results in a civil adjudication of status, not a  
 criminal conviction. So long as a juvenile remains within  
 the auspices of the FJDA for sentencing, he or she is  
 presumptively capable of rehabilitation, and any sentence

imposed by a district court must accord with this  
 presumption.

*Criminal Law & Procedure > Juvenile Offenders >  
 Sentencing > General Overview*

[HN2] 18 U.S.C.S. § 5032 provides that any proceedings  
 against an alleged juvenile delinquent may be convened  
 at any time and place within the district, in chambers or  
 otherwise. 18 U.S.C.S. § 5038(a) further provides that  
 throughout and upon the completion of the juvenile  
 delinquency proceeding, the records shall be safeguarded  
 from disclosure to unauthorized persons. 18 U.S.C.S. §  
 5038(a). Information about the juvenile record may not  
 be released when the request for information is related to  
 an application for employment, license, bonding, or any  
 civil right or privilege, except for in limited  
 circumstances relating to court proceedings, treatment,  
 law enforcement investigation, or national security.  
 Moreover, the statute specifies that the identity and image  
 of the juvenile may not be disclosed even where  
 proceedings are opened or documents are released:  
 neither the name nor picture of any juvenile shall be  
 made public in connection with a juvenile delinquency  
 proceeding, 18 U.S.C.S. § 5038(e).

*Criminal Law & Procedure > Criminal Offenses > Sex  
 Crimes > Sexual Assault > Abuse of Children > General*

*Overview**Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration*

[HN3] The Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.S. § 16901 *et seq.*, establishes a comprehensive national system for the registration of those offenders. SORNA defines sex offender as an individual who was convicted of a sex offense. 42 U.S.C.S. § 16911(1). The statute also specifies that: The term convicted or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense. 42 U.S.C.S. § 16911(3). Under 18 U.S.C.S. § 2241(c), any person who knowingly engages in a sexual act with another person who has not attained the age of 12 years may be convicted of aggravated sexual abuse. Any individual convicted of violating 18 U.S.C.S. § 2241 is classified as a Tier III sex offender under SORNA. 42 U.S.C.S. § 16911(4).

*Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration*

[HN4] Under the comprehensive national registration system of the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.S. § 16901 *et seq.*, sex offenders must register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. 42 U.S.C.S. § 16913(a). The offender must appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry. 42 U.S.C.S. § 16916. Each jurisdiction must make public the contents of its sex offender registry, including each registrant's name, address, photograph, criminal history, and status of parole, probation, or supervised release. 42 U.S.C.S. §§ 16914(b), 16918(a). Tier III sex offenders must register with the applicable jurisdiction every 3 months. The registration period for a Tier III offender is for life, 42 U.S.C.S. § 16915(a)(3), with the possibility of a reduced period of 25 years if the offender maintains a clean record, 42 U.S.C.S. § 16915(b)(2)-(3).

*Constitutional Law > The Judiciary > Case or Controversy > Mootness > General Overview*

[HN5] For a case or controversy to be justiciable under

U.S. Const. art. III, it must remain extant at all stages of review, not merely at the time the complaint is filed. Throughout the litigation, the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.

*Constitutional Law > The Judiciary > Case or Controversy > Mootness > General Overview*  
*Criminal Law & Procedure > Appeals > Procedures > General Overview*

[HN6] In criminal cases, a defendant wishing to continue an appeal after the expiration of his or her sentence must suffer some continuing injury or collateral consequence sufficient to satisfy U.S. art. III.

*Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Conclusions of Law*

[HN7] An appellate court reviews a district court's construction or interpretation of a statute de novo.

*Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview**Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration*

[HN8] The Federal Juvenile Delinquency Act (FJDA), 18 U.S.C.S. § 5031 *et seq.*, provides that unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding. 18 U.S.C.S. § 5038(e). The FJDA further provides that information about the juvenile record may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege. 18 U.S.C.S. § 5038(a). The Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.S. § 16901 *et seq.*, however, requires that a sex offender registry include the name, address, physical description, criminal history and status of parole, probation, or supervised release, current photograph, and other identifying information. 42 U.S.C.S. § 16914. SORNA further requires that each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. 42 U.S.C.S. § 16918(a). Because it is clear that the government's public release of juvenile records authorized by SORNA would have been prohibited under

the FJDA prior to the passage of SORNA, the two statutes conflict.

*Governments > Legislation > Interpretation*

[HN9] Where two statutes conflict, the later-enacted, more specific provision generally governs.

*Criminal Law & Procedure > Juvenile Offenders > Sentencing > General Overview*

*Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration*

[HN10] The Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.S. § 16901 *et seq.*, unambiguously directs juveniles over the age of 14 convicted of certain aggravated sex crimes to register, and thus carves out a narrow category of juvenile delinquents who must disclose their juvenile crimes by registering as a sex offender. For all other juvenile delinquents, the confidentiality provisions of the Federal Juvenile Delinquency Act, 18 U.S.C.S. § 5031 *et seq.*, remain in force.

*Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Conclusions of Law*

[HN11] An appellate court reviews the constitutionality of a statute de novo.

*Constitutional Law > Equal Protection > Level of Review*

[HN12] The Equal Protection Clause of the Fourteenth Amendment applies strict scrutiny if the aggrieved party is a member of a protected or suspect class, or otherwise suffers the unequal burdening of a fundamental right. Government actions that do not involve suspect classifications will be upheld if they are rationally related to a legitimate state interest.

*Constitutional Law > Equal Protection > Scope of Protection*

[HN13] Age is not a suspect classification under the Equal Protection Clause.

*Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment*

[HN14] The Eighth Amendment mandates that excessive

bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. The amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. The bar for cruel and unusual punishment is high.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege*

[HN15] The Fifth Amendment protects a person from being compelled in any criminal case to be a witness against himself. *U.S. Const. amend. V*. This protection extends not only to criminal proceedings, but any proceeding in which the answers might incriminate the individual in a future criminal proceeding. The Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege*

*Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Challenges*

[HN16] The registration required under the Sex Offender Registration and Notification Act, 42 U.S.C.S. § 16901 *et seq.*, does not subject the defendants to any additional criminal exposure or liability. Rather, it requires only an acknowledgment that they have been previously adjudicated or convicted of a crime. The Fifth Amendment is designed to protect against prospective incrimination. Other circuits have also rejected Fifth Amendment challenges to sex offender registration.

*Constitutional Law > Substantive Due Process > Scope of Protection*

[HN17] The Due Process Clause protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them. In a substantive due process analysis, an appellate court must first consider whether the statute in question abridges a fundamental right. If it does, the statute will be subject to strict scrutiny and is invalidated unless it is narrowly tailored to serve a compelling state interest. If not, the statute need only bear a reasonable relation to a legitimate state interest to justify the action.

*Constitutional Law > Substantive Due Process > Scope of Protection*

[HN18] The fundamental rights protected by substantive due process are those personal activities and decisions that the U.S. Supreme Court has identified as so deeply rooted in history and traditions, or so fundamental to the concept of constitutionally ordered liberty, that they are protected by the *Fourteenth Amendment*. Those rights are few, and include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview*

[HN19] An appellate court analyzes a procedural due process claim in two steps. The first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection*

[HN20] Adverse publicity or harm to the reputation of sex offenders does not implicate a liberty interest for the purposes of due process analysis.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection*

[HN21] Constitutionally protected liberty interests can be created where a law sets forth substantive predicates to govern official decision making and contains explicitly mandatory language that mandates a particular outcome.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Challenges*

[HN22] Additional process is only necessary where it gives a sex offender the ability to prove or disprove facts related to the applicability of the registration requirement. In other words, where the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest—no additional process is required

for due process.

*Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview*

[HN23] A party has waived an argument where it fails to raise it either in the district court or in his brief on appeal, and mentioned it for the first time at oral argument.

*Criminal Law & Procedure > Appeals > Procedures > Briefs*

[HN24] An appellate court reviews only issues that are argued specifically and distinctly in a party's opening brief.

COUNSEL: Anthony R. Gallagher, Federal Defender, Mark Werner, Deputy Federal Defender, Michael Donahoe and Robert Henry Branom, Jr., Assistant Federal Public Defenders, The Federal Defenders of Montana, for defendants-appellants Juvenile Males.

Michael W. Cotter, United States Attorney, Leif M. Johnson and Marcia Kay Hurd, Assistant United States Attorneys, for plaintiff-appellee United States of America.

JUDGES: Before: Kim McLane Wardlaw, Ronald M. Gould, and Jay S. Bybee, Circuit Judges. Opinion by Judge Wardlaw.

OPINION BY: Kim McLane Wardlaw

OPINION

[\*1002] WARDLAW, Circuit Judge:

Three juvenile defendants, each of whom is a member of an Indian Tribe and who pleaded true to a charge of aggravated sexual abuse with children, appeal their conditions of probation or supervision requiring registration under the Sex Offender Registration [\*2] and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.* Defendants argue that SORNA's registration requirement contravenes the confidentiality provisions of the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. § 5031 *et seq.*, and also challenge its constitutionality. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Because we conclude that Congress, in enacting SORNA, intentionally carved out a class of juveniles from the FJDA's confidentiality provisions, and that

SORNA's registration requirement is constitutionally sound, we affirm the district courts' imposition of the sex offender registration conditions.

#### I. Background

These consolidated appeals -- *United States v. Juvenile Male (I.M.T.D.)*, *United States v. Juvenile Male (L.S.)*, and *United States v. Juvenile Male (M.M.R.)* -- involve juvenile proceedings against three Native Americans who pleaded true to committing aggravated sexual abuse with children. As a condition of probation or supervision, each was required to register as a sex offender pursuant to SORNA.

#### A. Juvenile Defendants

##### 1. I.M.T.D.

I.M.T.D., an enrolled member of the Fort Peck Tribes, was charged with committing an act of juvenile delinquency pursuant [\*\*3] to 18 U.S.C. § 5031 *et seq.* for offenses committed in July 2008. I.M.T.D. was born on June 21, 1991 and thus was seventeen years old at the time of the offense and is twenty years old at present. If I.M.T.D. had been an adult at the time of the offense, the charge against him would have constituted aggravated sexual abuse with children in violation of 18 U.S.C. §§ 1153(a) and 2241(c).

On August 5, 2009, I.M.T.D. pleaded true to the information without entering into a plea agreement. On August 25, 2009, the district court entered a disposition sentencing I.M.T.D. to a three-year term of probation, subject to several conditions. As special conditions, the district court ordered I.M.T.D. to "comply with the requirements of the Sex Offender Registration and Notification Act;" "comply with Sexual Offender Registration requirements for convicted offenders in any state in which [I.M.T.D.] resides;" and "register in person as a sex offender with local/tribal/county law enforcement in the jurisdiction in which [I.M.T.D.] resides, is employed, and is a student."

##### 2. L.L.S.

L.L.S., an enrolled member of the Northern Cheyenne Tribe, was charged with committing an act of juvenile delinquency pursuant [\*\*4] to 18 U.S.C. § 5031 *et seq.* for offenses committed in approximately January or February 2005 and September 2007. L.L.S. was born

on January 19, 1991 and thus was between thirteen [\*\*1003] and sixteen years old at the time of the offenses and is twenty years old at present. Like I.M.T.D., if L.L.S. had been an adult at the time of the offenses, the charge against him would have constituted aggravated sexual abuse with children in violation of 18 U.S.C. §§ 1153(a) and 2241(c).

On April 30, 2009, L.L.S. pleaded true to the information pursuant to a plea agreement. The plea agreement states that "by pleading true pursuant to this agreement [L.L.S.] is waiving all the rights set forth in . . . paragraph [nine]," however, paragraph nine does not mention sex offender registration or any condition of supervision. Separately, the plea agreement states that L.L.S. "has been advised and understands, that under the Sex Offender Registration and Notification Act, a federal law, the defendant must register and keep the registration current."

At the June 19, 2009 sentencing hearing, L.L.S.'s counsel noted that the question of "whether or not a juvenile should be required to register underneath . . . SORNA" [\*\*5] was unresolved and pending before the Ninth Circuit. The district judge stated that "the issue that's before [the Ninth Circuit] is whether you can require a juvenile to register under SORNA at all . . . . And that issue, as far as I'm concerned, is preserved by you."

On June 22, 2009, the district court sentenced L.L.S. to official detention for three years, recommending that L.L.S. be placed in a therapeutic environment for youthful offenders, and ordered two years of juvenile delinquent supervision following his release from detention, subject to a number of special conditions. As special conditions, the district court ordered L.L.S. to "comply with the requirements of the Sex Offender Registration and Notification Act" and "register in person as a sex offender with local/tribal/county law enforcement in the jurisdiction in which [L.L.S.] resides, is employed, and is a student."

##### 3. M.M.R.

M.M.R., a member of an Indian Tribe, was charged with committing acts of juvenile delinquency pursuant to 18 U.S.C. § 5031 *et seq.* for offenses committed on November 13, 2008 on the Rocky Boy's Indian Reservation. M.M.R. was born on September 17, 1994 and thus was fourteen years old at the time of [\*\*6] the

offense and is seventeen years old at present. As with I.M.T.D. and L.L.S., if M.M.R. had been an adult at the time of the offenses, the charge against him would have constituted aggravated sexual abuse with children in violation of 18 U.S.C. §§ 1153(a) and 2241(c).

On August 27, 2009, M.M.R. pleaded true to the information without entering into a plea agreement. At the September 18, 2009 sentencing hearing, M.M.R.'s counsel objected to the imposition of SORNA's registration requirements on M.M.R. The district court agreed to withhold entry of a final order pending its review of supplemental briefing on the SORNA issue. Both the government and M.M.R. filed supplementary memoranda in which M.M.R. argued "that he should not have to register under SORNA's sex offender registration requirements because M.M.R. is a juvenile and his registration would be anathema to the fundamental purpose of the FJDA."

On September 28, 2009, the district court entered a disposition sentencing M.M.R. to two years of official detention, recommending that M.M.R. be placed in a therapeutic environment for youthful offenders. The district court ordered M.M.R. to enter juvenile delinquent supervision following [\*7] his release from detention until September 17, 2012, his eighteenth [\*1004] birthday, subject to a number of special conditions. As special conditions, the district court ordered M.M.R. to "comply with Sexual Offender Registration requirements for convicted offenders in any state in which [M.M.R.] resides" and "register in person as a sex offender with local/tribal/county law enforcement in the jurisdiction in which [M.M.R.] resides, is employed, and is a student."

#### B. The Federal Juvenile Delinquency Act ("FJDA")

The FJDA, 18 U.S.C. § 5031 *et seq.*, "governs the detention and disposition of juveniles charged with delinquency." *United States v. Three Juveniles*, 61 F.3d 86, 87 (1st Cir. 1995). First enacted in 1938, the FJDA was intended "to provide for the care and treatment of juvenile delinquents," *id.* at 88 (quoting H.R. Rep. No. 75-2617, at 1 (1938)), in recognition of significant differences between juvenile delinquents and adult offenders. As Congress later noted in a committee report on proposed amendments to the FJDA, "[o]ur objective must be . . . to minimize the youngster's penetration into all negative labeling, institutional processes . . . [a]t each critical step, we should exhaust [\*8] the less rejecting, the less stigmatizing recourses before taking the next

expulsive step." S. Rep. No. 93-1011, at 24 (1974) (internal quotation marks omitted).

We have concluded that "the purpose of the FJDA is to enhance the juvenile system by removing juveniles from the ordinary criminal justice system and by providing a separate system of "treatment" for them." *United States v. Juvenile*, 347 F.3d 778, 785 (9th Cir. 2003) (quoting *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir. 1980)). These safeguards are necessary "in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation." *United States v. Doe*, 94 F.3d 532, 536 (9th Cir. 1996) (internal quotation marks omitted). Thus[HN1] a "successful prosecution under the Act results in a civil adjudication of status, not a criminal conviction." *Juvenile*, 347 F.3d at 785 (quoting *United States v. Doe*, 53 F.3d 1081, 1083 (9th Cir. 1995)). "[S]o long as a juvenile remains within the auspices of the FJDA for sentencing, he or she is presumptively capable of rehabilitation, and any sentence imposed by a district court must accord with this presumption." *Id.*

The FJDA includes a number [\*9] of provisions to ensure that information about juvenile delinquency proceedings remains safeguarded.[HN2] 18 U.S.C. § 5032 provides that "any proceedings against" an alleged juvenile delinquent "may be convened at any time and place within the district, in chambers or otherwise." 18 U.S.C. § 5038(a) further provides that "[t]hroughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons." 18 U.S.C. § 5038(a). "[I]nformation about the juvenile record may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege," except for in limited circumstances relating to court proceedings, treatment, law enforcement investigation, or national security. *Id.* Moreover, the statute specifies that the identity and image of the juvenile may not be disclosed even where proceedings are opened or documents are released: "neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding." 18 U.S.C. § 5038(e).

#### C. The Sex Offender Registration and Notification Act ("SORNA")

On July 27, 2006, Congress [\*10] enacted the Adam Walsh Child Protection and Safety [\*1005] Act,

42 U.S.C. § 16901 et seq., which includes the Sex Offender Registration and Notification Act ("SORNA"). Congress enacted SORNA "[i]n order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators." 42 U.S.C. § 16901.[HN3] SORNA thus "establishes a comprehensive national system for the registration of those offenders." *Id.*

SORNA defines "sex offender" as "an individual who was convicted of a sex offense." 42 U.S.C. § 16911(1). The statute also specifies that:

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

42 U.S.C. § 16911(3) (emphasis added). Under 18 U.S.C. § 2241(c), any person who "knowingly engages in a sexual act with another person who has not attained the age of 12 years" may be convicted of [\*11] aggravated sexual abuse. *Id.* Any individual convicted of violating 18 U.S.C. § 2241 is classified as a "Tier III sex offender" under SORNA. 42 U.S.C. § 16911(4).<sup>1</sup>

1 All three defendants were over the age of 14 when the alleged offenses occurred, and each pleaded true to the information for committing an act of juvenile delinquency for what would have been a violation of 18 U.S.C. § 2241. Under the specific terms of SORNA, they thus qualify as "Tier III" sex offenders.

[HN4] Under SORNA's comprehensive national registration system, sex offenders must "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). The offender must "appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry." 42 U.S.C. § 16916. Each jurisdiction must make public the contents of its sex

offender registry, including each registrant's name, address, photograph, criminal history, and status of parole, probation, or supervised release. 42 U.S.C. §§ 16914(b), 16918(a). Tier III sex offenders must register with the applicable jurisdiction [\*12] every 3 months. *Id.* The registration period for a Tier III offender is for life, 42 U.S.C. § 16915(a)(3), with the possibility of a reduced period of 25 years if the offender maintains a clean record, 42 U.S.C. § 16915(b)(2)-(3).

## II. Mootness

[HN5] For a case or controversy to be justiciable under Article III, it must remain "extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (internal quotation marks omitted). "[T]hroughout the litigation," the party seeking relief "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)).<sup>2</sup>

2 The Supreme Court has recognized "numerous exceptions to mootness." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1141 (9th Cir. 2005) (en banc) (W. Fletcher, J., dissenting). These exceptions include cases involving a party that voluntarily ceases the offending conduct, but remains "free to return to his old ways," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953), wrongs [\*13] that are "capable of repetition, yet evading review," *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969) (internal quotation marks omitted), and class action suits where the named plaintiff's case is moot, *Sosna v. Iowa*, 419 U.S. 393, 399-401, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975). Because we conclude that the consolidated appeals before us are not moot, we need not analyze any of these exceptions.

[\*1006] In *United States v. Juvenile Male (Juvenile Male II)*, 131 S. Ct. 2860, 180 L. Ed. 2d 811 (2011), vacating 590 F.3d 924 (9th Cir. 2010), the Supreme Court found that an appeal of a similar sex offender registration condition was moot because the order of juvenile supervision imposing the condition had expired

prior to the Ninth Circuit's decision.<sup>3</sup> *Id.* at 2864. The defendant in *Juvenile Male II* pleaded guilty to charges that he engaged in sexual acts that, if he had been an adult, would have constituted aggravated sexual assault. *Id.* at 2862 (citing 18 U.S.C. §§ 1153(a), 2241(c)). The defendant was sentenced to official detention followed by a period of juvenile supervision, with the condition that he register as a sex offender, until his twenty-first birthday. *Id.* Defendant challenged the registration condition, but while his appeal was pending before [\*\*14] us, he turned twenty-one and the supervision order requiring him to register as a sex offender expired. *Id.* at 2863. The Supreme Court found that the expiration of the order rendered the appeal moot, because the defendant was "no longer subject to the sex-offender-registration condition that he sought to challenge on appeal." *Id.* at 2864.

3 The Ninth Circuit's vacated opinion in *United States v. Juvenile Male*, 590 F.3d 924, addressed the retroactive application of SORNA's registration requirement to persons adjudicated delinquent before SORNA was enacted by virtue of the Attorney General's promulgation of 28 C.F.R. § 72.3 pursuant to Congress's delegation of authority in 42 U.S.C. § 16913(d).

[HN6] In criminal cases, a defendant wishing to continue an appeal after the expiration of his or her sentence must suffer some "continuing injury" or "collateral consequence" sufficient to satisfy Article III. See *Spencer*, 523 U.S. at 7-8: Accordingly, to determine whether there was an ongoing "collateral consequence," the Court, in *United States v. Juvenile Male* (*Juvenile Male I*), 130 S. Ct. 2518, 177 L. Ed. 2d 64 (2010), had certified a question to the Montana Supreme Court, inquiring whether

[R]espondent's duty to remain [\*\*15] registered as a sex offender under Montana law [was] contingent upon the validity of the conditions of his now-expired federal juvenile-supervision order that required him to register as a sex offender, or is the duty an independent requirement of Montana law that is unaffected by the validity or invalidity of the federal juvenile-supervision conditions?

*Id.* at 2519-20 (citations omitted). The Montana Supreme Court responded that the "state law duty to remain registered as a sex offender is not contingent upon the validity of the conditions of his federal supervision order, but is an independent requirement of Montana law." *Juvenile Male II*, 131 S. Ct. at 2863 (internal quotation marks omitted). The U.S. Supreme Court then concluded, on the ground that any decision an appellate court could make would have no effect, not even on the state registration requirement, that the "Ninth Circuit lacked the authority under Article III to decide this case on the merits." *Id.* at 2865.

The government argues that the three consolidated cases under review here [\*\*1007] are similarly moot because the defendants "are required to register independently under Montana state law regardless of any decision by this [\*\*16] Court addressing their SORNA obligations under federal law." We disagree. First, each of the juvenile defendants in this case is currently subject to an unexpired condition of his release or supervision requiring sex offender registration under SORNA. Indeed, the conditions requiring registration will remain in effect until August 23, 2012 for I.M.T.D., September 17, 2012 for M.M.R., and March 2014 for L.L.S. Second, in addition to those conditions, all three defendants are subject to SORNA's independent registration requirement for a period of at least twenty-five years, if not for the duration of their life, because of their status as Tier III sex offenders. 42 U.S.C. § 16915(a)(3), (b)(2)-(3). This federal requirement that the defendants register as sex offenders is independent from any requirement under state law. Because this federal requirement remains in effect, whether defendants are properly subject to SORNA's registration requirement remains a live controversy for us to adjudicate, and these consolidated appeals thus are not moot.

In *Juvenile Male II*, the Supreme Court considered and rejected the argument that the appeal in that case "cannot be considered moot in any practical [\*\*17] sense" because . . . respondent may have 'an independent duty to register as a sex offender' under SORNA itself." 131 S. Ct. at 2864-65. The Supreme Court held that because the defendant had only challenged the validity of the special conditions of supervision, any broader question related to SORNA's requirement was not at issue. *Id.* at 2865. The Court did acknowledge that the independent, continuing obligation under SORNA, in another case, "might provide grounds for a

pre-enforcement challenge to SORNA's registration requirements." *Id.* The instant consolidated appeal is precisely such a case, as each defendant objects both specifically to the special condition requiring registration and generally to the constitutionality of SORNA as applied to juveniles, and therefore is not moot.

### III. Conflict Between FJDA and SORNA

We next consider whether the SORNA registration requirement imposed by the district court contravenes the confidentiality provisions of the FJDA. [HN7] We review a district court's construction or interpretation of a statute *de novo*. See *Beeman v. TDI Managed Care Servs.* 449 F.3d 1035, 1038 (9th Cir. 2006); *United States v. Cabacang*, 332 F.3d 622, 624-25 (9th Cir. 2003) (en [\*18] banc).

The government argues that SORNA and the FJDA do not conflict because they each operate on different classes of individuals and agencies. Specifically, it contends that the FJDA's confidentiality provisions restrict disclosure of the records of juvenile proceedings by employees of the court or any government agency, 18 U.S.C. § 5038(c), while SORNA's reporting requirements operate directly on the juvenile himself. We disagree with that characterization, and find that several provisions of the two statutes conflict because SORNA's registration provision makes public information that would otherwise remain confidential under the FJDA.

[HN8] The FJDA provides that "[u]nless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding." 18 U.S.C. § 5038(e) (emphasis added). The FJDA further provides that "information about the juvenile record may not be released when the request for information is related to an [\*1008] application for employment, license, bonding, or any civil right or privilege." 18 U.S.C. § 5038(a). SORNA, however, requires that a sex offender registry include [\*19] the name, address, physical description, criminal history and status of parole, probation, or supervised release, current photograph, and other identifying information. 42 U.S.C. § 16914. SORNA further requires that "each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry." 42 U.S.C. § 16918(a). Because it is clear that the government's public release of juvenile records

authorized by SORNA would have been prohibited under the FJDA prior to the passage of SORNA, we find that the two statutes conflict.

[HN9] Where two statutes conflict, the later-enacted, more specific provision generally governs. See *Acosta v. Gonzales*, 439 F.3d 550, 555 (9th Cir. 2006) ("[C]onflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute." (internal quotation marks omitted)), *abrogated on other grounds by Garfias-Rodriguez v. Holder*, 649 F.3d 942, 948 (9th Cir. 2011).[HN10] SORNA unambiguously directs juveniles over the age of 14 convicted of certain aggravated sex crimes to register, [\*20] and thus carves out a narrow category of juvenile delinquents who must disclose their juvenile crimes by registering as a sex offender. For all other juvenile delinquents, the FJDA's confidentiality provisions remain in force.

The relationship between SORNA and the FJDA is further clarified by Congress's clearly stated intent to limit confidentiality in the case of certain juvenile sex offenders. See H.R. Rep. 109-218, pt. 1, at 25 (2005) ("While the Committee recognizes that States typically protect the identity of a juvenile who commits criminal acts, in the case of sexual offenses, the balance needs to change; no longer should the rights of the juvenile offender outweigh the rights of the community and victims to be free from additional sexual crimes . . . . H.R. 3132 strikes the balance in favor of protecting victims, rather than protecting the identity of juvenile sex offenders."); 152 Cong. Rec. S8012, S8023 (daily ed. July 20, 2006) (statement of Sen. Kennedy) ("This compromise allows some offenders over 14 to be included on registries, but only if they have been convicted of very serious offenses."). Thus, Congress was aware that it was limiting protections under the FJDA by [\*21] applying SORNA to certain juvenile delinquents, and intended to do so.

We therefore hold that the district court properly applied SORNA's registration requirements to the juvenile defendants in these cases. Although the defendants may disagree with the policy implications of SORNA, particularly with regard to confidentiality, Congress appears to have considered those concerns in enacting SORNA. Our review is limited to interpreting the statutes, and both the statutory text and legislative history of SORNA suggest its reporting and registration

requirements were intended to reach a limited class of juveniles adjudicated delinquent in cases of aggravated sexual abuse, including appellants.

#### IV. Constitutional Challenges

Defendants further argue that subjecting juvenile sex offenders to SORNA's registration is unconstitutional. In particular, they allege that doing so violates (i) the *equal protection clause*; (ii) the prohibition against cruel and unusual punishment; (iii) the right against self-incrimination; (iv) substantive due process; (v) procedural due process; and (vi) the right [\*1009] to effective counsel. [HN11] We review the constitutionality of a statute de novo. *Emique v. Powell*, 302 F.3d 971, 973 (9th Cir. 2002) [\*22] (citing *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993)).

##### A. Equal Protection

Defendants argue that SORNA's registration requirements violate the juveniles' right to equal protection by irrationally distinguishing between juvenile sex offenders over fourteen, who are categorically required to register as sex offenders, and other juvenile offenders, who are entitled to an adversary hearing on whether transfer to adult court is appropriate.

[HN12] The *Equal Protection Clause* of the *Fourteenth Amendment* applies strict scrutiny if the aggrieved party is a member of a protected or suspect class, or otherwise suffers the unequal burdening of a fundamental right. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). "Government actions that do not . . . involve suspect classifications will be upheld if [they] are rationally related to a legitimate state interest." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005).

However, defendants -- juvenile sex offenders over the age of fourteen -- do not fall within a protected class. We have previously rejected the argument that sex offenders are a suspect or protected class. *United States v. LeMay*, 260 F.3d 1018, 1030-31 (9th Cir. 2001). [\*23] Further, [HN13] "age is not a suspect classification under the *Equal Protection Clause*." *Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (citing *City of Cleburne*, 473 U.S. at 441 ("We have declined, however, to extend heightened review to

differential treatment based on age")).

This conclusion is consistent with that of the Sixth Circuit, which heard an equal protection challenge to a similar juvenile registration requirement in *Doe v. Michigan Department of State Police*, 490 F.3d 491 (6th Cir. 2007). There, the defendants challenged a Michigan sex offender registration program, in part, because it "requir[ed] youthful trainees charged with sex offenses to register while not requiring youthful trainees charged with other offenses to do so." *Id.* at 502. The Sixth Circuit, noting that the set of suspect classifications recognized by the Supreme Court was limited, held that "the classification raised by the plaintiffs does not implicate a suspect class and that rational-basis review is accordingly appropriate." *Id.* at 503.

Because defendants in this case have failed to establish membership in a recognized protected class, SORNA is subject to rational basis review for the purpose of equal protection [\*24] analysis. SORNA's language and legislative history clearly indicate the legislative purpose for which it was enacted. *See* 42 U.S.C. § 16901 (in enacting SORNA, "Congress . . . establishes a comprehensive national system" that is designed to "protect the public from sex offenders and offenders against children"); *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894, 8895 (Feb. 28, 2007) (noting that SORNA was "designed . . . for the protection of the public"). We have held that protecting our communities is a legitimate legislative purpose. *See Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (holding, with regard to Alaska's sex offender registration laws, that "the statute's provisions serve a 'legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community'" (internal quotation marks omitted)). The Supreme Court has also held that "there is no doubt [\*1010] that preventing danger to the community is a legitimate regulatory goal." *United States v. Salerno*, 481 U.S. 739, 747, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). Thus, SORNA's requirements satisfy rational basis review and do not violate the *Equal Protection Clause*.

##### B. [\*25] Cruel and Unusual Punishment

Defendants argue that by sanctioning a class of juvenile offenders with registration requirements, SORNA violates the *Eighth Amendment's* prohibition on cruel and unusual punishment.

[HN14] The *Eighth Amendment* mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The amendment prohibits "not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284, 303, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (holding that defendant's *Eighth Amendment* right was violated where defendant received the "penultimate sentence" for a minor, check writing offense).

The bar for cruel and unusual punishment is high. See, e.g., *United States v. Nagel*, 559 F.3d 756, 763 (7th Cir. 2009) (citing *Ewing v. California*, 538 U.S. 11, 28-30, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (affirming sentence of 25 years to life imposed for felony grand theft of three golf clubs under three strikes law); *Harmelin v. Michigan*, 501 U.S. 957, 961, 966, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (affirming life in prison without the possibility of parole for first-time offender possessing 672 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370, 370-71, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982) (no constitutional [\*26] error in two consecutive terms of 20 years in prison for possession with intent to distribute and distribution of 9 ounces of marijuana)).

Although defendants understandably note that SORNA may have the effect of exposing juvenile defendants and their families to potential shame and humiliation for acts committed while still an adolescent, the statute does not meet the high standard of cruel and unusual punishment. The requirement that juveniles register in a sex offender database for at least 25 years because they committed the equivalent of aggravated sexual abuse is not a disproportionate punishment. These juveniles do not face any risk of incarceration or threat of physical harm. In fact, at least two other circuits have held that SORNA's registration requirement is not even a punitive measure, let alone cruel and unusual punishment. See *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008) ("SORNA's registration requirement demonstrates no congressional intent to punish sex offenders"); see also *United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009).

Given the high standard that is required to establish cruel and unusual punishment, we hold that SORNA's registration requirements [\*27] do not violate the *Eighth Amendment*.

#### C. Self-Incrimination

Defendants argue that SORNA's registration requirement violates the *self-incrimination clause* of the *Fifth Amendment* by requiring registrants to file documents acknowledging commission of a sex offense. Because SORNA registrants are compelled to register under threat of legal sanction, and because the documents could potentially be used to prove the commission of a prior sex crime or in determining sentencing enhancements, defendants argue that the registration requirement is unconstitutional.

[\*1011] [HN15] The *Fifth Amendment* protects a person from being "compelled in any criminal case to be a witness against himself." *U.S. Const. amend. V*. This protection extends not only to criminal proceedings, but any proceeding in which the answers might incriminate the individual in a future criminal proceeding. *Allen v. Illinois*, 478 U.S. 364, 368, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986) (emphasis added). "[T]he *Fifth Amendment* privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." *Balt. Dep't of Social Servs. v. Bouknight*, 493 U.S. 549, 556, 110 S. Ct. 900, 107 L. Ed. 2d 992 (1990).

[HN16] The registration [\*28] required under SORNA does not subject the defendants to any additional criminal exposure or liability. Rather, it requires only an acknowledgment that they have been previously adjudicated or convicted of a crime. The *Fifth Amendment* is designed to protect against prospective incrimination, but here the defendants have already pleaded true to the underlying criminal conduct. Other circuits have also rejected *Fifth Amendment* challenges to sex offender registration. See, e.g., *United States v. Simon-Marcos*, 363 Fed. App'x 726, 728 (11th Cir. 2010) ("[Defendant] cannot show, and does not attempt to show, that anything he would have been required to provide under Georgia's sex offender statute would have confronted him with a substantial hazard of self-incrimination."); *Doe v. Miller*, 405 F.3d 700, 717-18 (8th Cir. 2005) (holding that *Fifth Amendment* challenge to sex offender registration statute "is both misdirected and premature").

Review of the cases in which the Supreme Court concluded that registration requirements violate the *self-incrimination clause* is instructive. In these cases, it is evident that an unconstitutional registration would require disclosure that is effectively an [\*29] admission

of uncharged criminal activity. See, e.g., *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969) (invalidating statute requiring defendant to identify himself as transferee of marijuana who had failed to register and pay an occupational tax); *Haynes v. United States*, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923, 1968-1 C.B. 615 (1968) (striking down statute that required registration of individuals transacting in firearms and that was applied only to weapons used principally by persons engaged in unlawful activities); and *Marchetti v. United States*, 390 U.S. 39, 60-61, 88 S. Ct. 697, 19 L. Ed. 2d 889, 1968-1 C.B. 500 (1968) (striking down statute requiring gamblers to register with the Internal Revenue Service, in light of wide prohibition of gambling). Under these statutes, compliance with the disclosure requirements "produced an immediate or real and appreciable hazard of self-incrimination due to the fact that the statutes were largely designed to discover . . . involvement in the prohibited activity." *S.E.C. v. Fehn*, 97 F.3d 1276, 1292 (9th Cir. 1996) (internal quotation marks omitted). That is not the case with SORNA, which does not require the disclosure of any information that would constitute admission of an uncharged crime.

Because defendants fail to establish that registration [\*30] under SORNA could subject them to future criminal liability, they cannot properly avail themselves of the Fifth Amendment's protections against self-incrimination.

#### D. Substantive Due Process

Defendants argue that SORNA's registration requirement violates their substantive due process rights because it discards their "right to lifetime confidentiality" under the FJDA and subjects them to "onerous lifetime probation."

[\*1012] [HN17] The *Due Process Clause* protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). In a substantive due process analysis, we must first consider whether the statute in question abridges a fundamental right. *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (explaining that the analysis begins with a "careful description of the asserted right"). If it does, the statute will be subject to strict scrutiny and is invalidated unless it is "narrowly tailored to serve a compelling state interest." *Id.* If not, the statute need only

bear a "reasonable relation to a legitimate state interest to justify the action." *Washington v. Glucksberg*, 521 U.S. 702, 722, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).

Defendants [\*31] fail to identify the fundamental right implicated by SORNA's registration requirement, and instead focus on whether the statute is penal in nature under the factors laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). The Supreme Court has described [HN18] the "fundamental" rights protected by substantive due process as "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." *Glucksberg*, 521 U.S. at 727. Those rights are few, and include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment. *Id.* at 720. None of these rights are, or could be, asserted by defendants in this case. Nor do any of defendants' rights that are potentially at stake appear to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by [\*32] *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

This conclusion is consistent with our holding in *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004), where we found that individuals convicted of serious sex offenses do not have a fundamental right to be free from sex offender registration requirements, and that such requirements serve "a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* (internal quotation marks omitted). Several other circuits have similarly rejected substantive due process challenges to sex offender registration, holding that sex offenders do not have a fundamental right to avoid publicity. See, e.g., *United States v. Ambert*, 561 F.3d 1202, 1209 (11th Cir. 2009) (holding that the right of a sex offender to refuse subsequent registration of his or her personal information

with Florida law enforcement and prevent publication of this information on Florida's Sexual Offender/Predator website is not a right that is [\*33] "deeply rooted in this Nation's history and tradition"); *Does v. Munoz*, 507 F.3d 961, 965-66 (6th Cir. 2007) (holding that juvenile sex offenders' interest in private records was not a fundamental right); *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 501 (6th Cir. 2007) (holding that juvenile sex offender registration "does not rise to the level of a substantive due process violation based upon the relevant [\*1013] caselaw, but the inconsistency and the harms to the plaintiffs from their inclusion on the registry are troubling and noteworthy").

Given the limited range of rights that have been recognized as "fundamental" for the purposes of substantive due process analysis, defendants have failed to establish a substantive due process violation.

#### E. Procedural Due Process

Defendants argue that SORNA's registration requirement violates their procedural due process rights by treating their juvenile adjudication as a criminal conviction and subjecting them to the resulting publicity, without the benefit of a public jury trial or transfer hearing.

[HN19] We analyze a procedural due process claim in two steps. "[T]he first asks whether there exists a liberty or property interest which has been interfered [\*34] with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Carver v. Lehman*, 558 F.3d 869, 872 (9th Cir. 2009) (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)).

Defendants argue that the interest at stake is their expectation of confidentiality in juvenile proceedings, which they allege is undermined by SORNA's public registration requirements. However, SORNA does not render the entire juvenile adjudication process public. Juvenile sex offenders can still avail themselves of closed hearings, sealed records, and the other procedural protections of the juvenile process. But more importantly, because we conclude that the confidentiality provisions of the FJDA were intentionally superseded by the passage of SORNA, the underlying interest in confidentiality that defendants rely upon no longer exists. In the absence of that specific statutory right, defendants offer no support

for the notion that they have a broader right. In fact, the Supreme Court has held that [HN20] adverse publicity or harm to the reputation of sex offenders does not implicate a liberty interest for the purposes of due process analysis. [\*35] *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).

Defendants rely heavily on the factors set forth in *Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), to establish that SORNA is a punitive statute, and thus necessarily deprives them of a liberty or property interest. Whether SORNA is punitive is not dispositive. Even if defendants were correct that SORNA is punitive, that does not necessarily give rise to a protected liberty interest for the purposes of due process. We have recognized that [HN21] constitutionally protected liberty interests can be created where a law sets forth "substantive predicates to govern official decision making" and contains "explicitly mandatory language" that mandates a particular outcome. *Valdez v. Rosenbaum*, 302 F.3d 1039, 1044 (9th Cir. 2002) (internal quotation marks omitted). However, no such legal basis exists here, as the FJDA's provisions have been superseded by SORNA. Our conclusion is consistent with that of other circuits that have considered this question, each rejecting the argument that SORNA is a punitive statute and characterizing it instead as a civil regulation.<sup>4</sup> See, e.g., *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008) ("SORNA's registration [\*36] requirement [\*1014] demonstrates no congressional intent to punish sex offenders"); see also *United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009) ("[W]e now hold -- in line with all of our sister Circuits to have considered the issue -- that SORNA is a civil regulation").

4 Because we need not reach this question to determine whether SORNA's registration provision violates Defendants' procedural due process rights or constitutes cruel and unusual punishment, we do not specifically adopt this holding for the Ninth Circuit.

Even if defendants had sufficiently identified an interest at stake, juvenile offenders would not be entitled to any additional process before they are subject to SORNA's registration requirements. [HN22] Additional process is only necessary where it gives a sex offender the ability to prove or disprove facts related to the applicability of the registration requirement. In other

words, where "the law's requirements turn on an offender's conviction alone -- a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest" -- no additional process is required for due process. *Doe v. Tandeske*, 361 F.3d 594, 596 (9th Cir. 2004) (internal quotation [\*\*37] marks omitted) (rejecting procedural due process challenge to state sex offender registration statute where additional process would be a "bootless exercise" because the only relevant fact to whether registration is required is whether a conviction exists); see also *Conn. Dep't of Pub. Safety*, 538 U.S. at 7-8 (denying procedural due process challenge to state sex offender registry where registration was required by the fact of conviction as sex offender, irrespective of any other factors, thus rendering any additional process meaningless and unnecessary). In this case, juvenile sex offenders are required to register on the basis of their adjudicated juvenile status, which explicitly triggers SORNA's requirements under 42 U.S.C. § 16913. Thus, because defendants are not challenging whether they received adequate due process in their juvenile proceedings, there is no basis for a procedural due process claim.

Further, adequate procedural safeguards at the conviction stage are sufficient to obviate the need for any additional process at the registration stage. *United States v. Fernandes*, 636 F.3d 1254, 1257 (9th Cir. 2011) ("Defendant was afforded due process in his criminal proceeding [\*\*38] and chose to plead guilty to a sex offense. Requiring Defendant to register as a sex offender does not violate his right to procedural due process."). The purpose of due process is to protect juvenile sex offenders from unjust registry, but any juvenile required to register under SORNA was protected at their adjudication by the "fundamental fairness" standard. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1970).

Defendants may have serious concerns about the policy ramifications of SORNA, particularly with regard to confidentiality. However, even if SORNA subjects juvenile sex offenders to a condition that adult sex offenders must comply with, that does not necessarily eradicate all differences between the adult and juvenile

processes and transform the latter into a "criminal" proceeding. Defendants' concerns about SORNA do not rise to a level that merits constitutional recourse on procedural due process grounds.

#### F. Ineffective Assistance of Counsel

At the second oral argument in this case, defendants' counsel briefly raised, for the first time, an additional constitutional argument grounded in the *Sixth Amendment's* guarantee of effective assistance of counsel. Defendants' counsel failed [\*\*39] to further explain the basis for this argument in any detail at oral argument, but did acknowledge it was not raised in any of the briefing.

Because this argument was not presented in the briefs -- including those specifically [\*1015] invited by us on any constitutional issues implicated by SORNA -- it has been forfeited. *Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 2008) (holding that [HN23] a party has waived an argument where it "fail[ed] to raise it either in the district court or in his brief on appeal, [and] mention[ed] it for the first time at oral argument"). [HN24] "We review only issues [that] are argued specifically and distinctly in a party's opening brief." *Christian Legal Soc'y of Univ. of Cal. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010) (quoting *Brownfield v. City of Yakima*, 612 F.3d 1140, 1149 n.4 (9th Cir. 2010)). Applying this standard, we have refused to address claims that were only "argue[d] in passing," *Brownfield*, 612 F.3d at 1149 n.4, or that were "bare assertion[s] . . . with no supporting argument," *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1079 n.26 (9th Cir. 2008). We therefore decline to address Defendants' ineffective assistance of counsel argument.

#### V. Conclusion

We therefore [\*\*40] affirm the district courts' imposition of SORNA's registration requirements as a condition of probation or supervision on the three juvenile defendants in this case.

**AFFIRMED.**



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PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND,  
Plaintiff-Appellee, v. UNITED STATES DEPARTMENT OF THE AIR FORCE,  
Defendant-Appellant. SEATTLE BUILDING AND CONSTRUCTION TRADES  
COUNCIL, AFL-CIO; REBOUND, Plaintiffs-Appellants, v. UNITED STATES  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,  
Defendant-Appellee. SEATTLE BUILDING AND CONSTRUCTION TRADES  
COUNCIL, AFL-CIO; REBOUND, Plaintiffs-Appellees, v. UNITED STATES  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,  
Defendant-Appellant.

No. 90-16659, No. 91-35076, No. 91-35193

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

26 F.3d 1479; 1994 U.S. App. LEXIS 15012; 128 Lab. Cas. (CCH) P33,106; 94 Cal.  
Daily Op. Service 4595; 94 Daily Journal DAR 8535

January 7, 1992, Argued, Submitted; March 15, 1993, Submission Withdrawn; April  
18, 1994, Resubmitted, Seattle, Washington  
June 20, 1994, Filed

**PRIOR HISTORY:** [\*\*1] Appeal from the United States District Court for the District of Hawaii. D.C. No. CV-89-00713-ACK. Alan C. Kay, District Judge, Presiding. Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-89-1346-C. John C. Coughenour, District Judge, Presiding.

LexisNexis(R) Headnotes

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Personal Information*  
[HN1] See 5 U.S.C.S. § 552(b)(7)(C).

*Administrative Law > Governmental Information > Freedom of Information > Enforcement > Standards of Review*

*Civil Procedure > Summary Judgment > Appellate Review > Standards of Review*

*Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review*

[HN2] The Ninth Circuit ordinarily reviews a grant of summary judgment de novo to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court applied the correct substantive law. In the Ninth Circuit, however, a two-step standard of review is applied to Freedom of Information Act cases. The court determines whether the district court had an adequate factual basis on which to make its decision and, if so, review for clear error the district court's finding that the documents were exempt.

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Medical & Personnel Files*  
*Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Free Press > General*

#### Overview

[HN3] 5 U.S.C.S. § 552(b)(6) requires that courts balance the public interests in disclosure against the privacy interests that would be harmed by disclosure. A court cannot limit its evaluation of the effects of disclosure to the requesting party's particular purpose in seeking disclosure.

*Administrative Law > Governmental Information > Personal Information > General Overview*  
*Constitutional Law > Substantive Due Process > Privacy > Personal Information*

[HN4] Significant privacy interests are implicated by the release of names, addresses and particularized wage information.

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Medical & Personnel Files*

[HN5] The privacy interest protected by 5 U.S.C.S. § 552(b)(6) encompasses the individual's control of information concerning his or her person. An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.

*Administrative Law > Governmental Information > Personal Information > General Overview*

[HN6] Workers on federally-funded construction projects have a substantial privacy interest in information tying their names and addresses to precise payroll figures.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*

[HN7] The Freedom of Information Act only recognizes the public's interest in knowing "what their government is up to" and does not create an avenue to acquire information about other private parties held in the government's files.

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John F. Daly, United States Department of Justice, Washington, D.C., for the defendant-appellee, appellant, in 91-35076 91-35193.

JUDGES: Before: Eugene A. Wright, William A. Norris, and Cynthia Holcomb Hall, Circuit Judges. Opinion by Judge Hall; Concurrence by Judge Norris.

OPINION BY: HALL

OPINION

[\*1481] OPINION

HALL, Circuit Judge:

We have before us two cases in which labor organizations seek to procure records from government agencies under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. They seek to glean insight into the government's enforcement of prevailing [\*\*2] wage standards for employees of government contractors. In each case, the district court ruled for the labor organization and ordered the government agency to produce the information. We reverse.

#### I

In No. 90-16659, the Painting Industry of Hawaii Market Recovery Fund ("Recovery Fund") sought disclosure from the Air Force of certain payroll information provided to the government by a private contractor working on a construction contract at Hickam Air Force Base. The contractor was required to pay workers the prevailing wage for their work under the Davis-Bacon Act, 40 U.S.C. § 276a, and Federal Acquisition Regulations, 48 C.F.R. §§ 22.400-22.407. Under the Copeland Anti-Kickback Act; 40 U.S.C. § 276c, the contractor was required to file "certified payroll records" with the contracting agency (here, the Air Force). These records contain detailed information about each employee working on a particular project: the worker's name and address, social security number, job classification, hourly rate of pay, number of hours worked during the reporting period, wages and fringe benefits paid, and deductions taken out [\*\*3] of the worker's wages.

The Air Force denied Recovery Fund's FOIA request for the certified payroll records for the Hickam Air Force Base Project, asserting that the information fell within FOIA's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) ("Exemption 4"). Recovery Fund filed an administrative appeal, which was also denied. Recovery Fund then brought suit in district court to compel disclosure of the payroll records. The Air Force asserted a defense not only under Exemption 4, but also under Exemption 6<sup>1</sup> and Exemption 7(C) to FOIA.<sup>2</sup> On cross-motions for summary judgment, the district court held that genuine issues of material fact precluded summary judgment on the Air Force's Exemption 4 defense. 751 F. Supp. 1410, 1414-15. The district court granted partial summary judgment to Recovery Fund, holding that Exemption 6 did not justify nondisclosure of most of the information contained in the payroll records because "the employees' modest privacy interest in preventing disclosure of such information when balanced against [\*\*4] the significant public interests in monitoring compliance with the Davis-Bacon Act tips decidedly in favor of disclosure." *Id.* at 1417. The district court held that the employees' social security numbers were properly withheld under Exemption 6. *Id.* at 1418.

1 FOIA Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

2 "[HN1] This section does not apply to matters that are records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Finally, the district court granted partial summary judgment for Recovery Fund on the Air Force's Exemption 7(C) defense. The [\*\*5] district court did not reach the question of whether the payroll records were "compiled for law enforcement purposes" because it held that the Air Force did not show that the "balance of private versus public interests under the analysis of Exemption 6 was so close" that the slightly lighter burden of proof imposed on the Air Force by Exemption 7(C) "would tilt that balance in favor of non-disclosure." *Id.* at

1418.<sup>3</sup>

3 "Exemption 7(C) is more protective of privacy than Exemption 6: the former provision applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,' while the latter bars any disclosure that 'would constitute' an invasion of privacy that is 'clearly unwarranted.'" *United States Dep't of Defense v. FLRA*, 127 L. Ed. 2d 325, 114 S. Ct. 1006, 1013 n.6 (1994).

[\*1482] After the district court denied the Air Force's motion for reconsideration, 756 F. Supp. 452, [\*\*6] the Air Force withdrew its defense based on Exemption 4 and stipulated to the entry of final judgment in the district court. The Air Force offered to provide the payroll records to Recovery Fund with the names, addresses, and other personal identifiers of the workers redacted. The Air Force appeals the district court's grant of summary judgment in favor of Recovery Fund as to Exemptions 6 and 7(C).

In No. 91-35076, Seattle Building and Construction Trades Council, AFL-CIO, and Rebound (collectively "Rebound") requested that the Department of Housing and Urban Development ("HUD") release copies of certified payroll records. These records were filed in connection with a housing rehabilitation project carried out by the City of Seattle with assistance from HUD. The records were submitted by the City's electrical contractor. The City released the records after redacting all information that would identify individual workers, such as their names, addresses, and social security numbers. HUD informed Rebound that the identifying information had been properly redacted pursuant to Exemptions 6 and 7(C). The redaction was affirmed on administrative appeal.

Rebound filed suit in district court [\*\*7] to compel disclosure of the certified payroll records with only social security numbers redacted. Rebound also sought a variety of other remedies, including an injunction ordering future release of similar records, declaratory relief, attorneys' fees, and the appointment of a special prosecutor pursuant to 5 U.S.C. § 552(a)(4)(F). On cross-motions for summary judgment, the district court granted partial summary judgment for Rebound and rejected HUD's Exemption 6 and 7(C) defenses. The district court followed a similar line of analysis as the district court in *Recovery Fund*. The district court ordered HUD to

produce the records sought by Rebound, with social security numbers redacted, and denied the other relief sought by Rebound. Both parties appeal.

## II

[HN2] We ordinarily review a grant of summary judgment de novo to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court applied the correct substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-41 (9th Cir. 1989). In this circuit, however, [\*\*8] we apply a two-step standard of review to FOIA cases. We determine whether the district court had an adequate factual basis on which to make its decision and, if so, review for clear error the district court's finding that the documents were exempt. *Lewis v. IRS*, 823 F.2d 375, 377-78 (9th Cir. 1987); but see *Petroleum Information Corp. v. United States Dep't of Interior*, 298 U.S. App. D.C. 125, 976 F.2d 1429, 1433 (D.C. Cir. 1992) (R.B. Ginsburg, J.) (applying "in FOIA cases the same standard of appellate review applicable generally to summary judgments").

## III

[HN3] We now turn to the merits. Exemption 6 requires that courts balance the public interests in disclosure against the privacy interests that would be harmed by disclosure. *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989). We cannot limit our evaluation of the effects of disclosure to the requesting party's particular purpose in seeking disclosure. *Id.* at 771 [\*\*9] ("Whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made."). We must evaluate both the public benefit and the potential invasion of privacy by looking at the nature of the information requested and the uses to which it could be put if released to any member of the public. See *United States Dep't of Defense v. FLRA*, 127 L. Ed. 2d 325, 114 S. Ct. 1006, 1015-16 (1994) ("when we consider that other parties, such as commercial advertisers and solicitors, must have the same access [\*1483] under FOIA as the unions to the employee address lists sought in this case, it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant.") (citations omitted); *Reporters Committee*, 489 U.S. at 771 ("The rights of the two press [requesters seeking to

procure criminal rap sheets] are no different from those that might be asserted by any other third party, such as a neighbor or prospective employer."); see also *Department of the Air Force v. Rose*, 425 U.S. 352, 380-81, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976) [\*\*10] (when evaluating a request filed by law review editors for disclosure of Air Force Academy discipline reports from which names were redacted, court considered possibility that former classmates might be able to identify subjects of the reports even though the requesters would not be able to do so); *National Ass'n of Retired Fed. Employees v. Horner*, 279 U.S. App. D.C. 27, 879 F.2d 873, 878 (D.C. Cir. 1989) (considering use to which mass marketers would put list of federal retirees in evaluating employee association's request for name and address list), cert. denied, 494 U.S. 1078, 110 S. Ct. 1805, 108 L. Ed. 2d 936 (1990).

## A

We first consider the privacy interests implicated by the FOIA requests at issue. The requesters seek to procure not only a name and address list of workers, but a list that connects those names to precise information about each worker's occupational classification, wages, and wage deductions. It cannot be disputed that this information is normally considered private. In *Horner*, the District of Columbia Circuit held that a list revealing only the names [\*\*11] and addresses of federal retirees constituted a "significant" invasion of privacy because the retirees would be attractive targets for mass marketers. *Horner*, 879 F.2d at 878; see also *United States Dep't of Defense*, 114 S. Ct. at 1015 (interest in nondisclosure of home addresses is "not insubstantial"); *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d 503, 510-11 (2d Cir. 1992).

In the cases before us, the requesters seek a list of people engaged in the construction trade, broken into their particular occupational classification. Undoubtedly, such a list would be of interest to people interested in marketing goods and services to people working in the construction trades. As in *Horner*, there is a "substantial probability that the disclosure will lead to" the use of the list by marketers and a concomitant invasion of the workers' right to be let alone. See *Horner*, 879 F.2d at 878; see also *United States Dep't of Defense*, 114 S. Ct. at 1015-16 (privacy interest [\*\*12] far from insignificant when considering commercial advertisers must have the same access under FOIA). In *Minnis*, we recognized the

invasion of privacy that can result from release of a list of names and addresses coupled with a characteristic susceptible to commercial exploitation: "Disclosure [of a list of persons seeking a permit to use a particular river for recreational purposes] would reveal not only the applicants' names and addresses, but also their personal interests in water sports and the out-of-doors. Other commercial advertisers could obtain the list, subjecting the applicants to an unwanted barrage of mailings and personal solicitations." *Minnis*, 737 F.2d at 787 (citation omitted).

[HN4] The requesters here not only seek names and addresses, but also particularized information about wages. We agree with those circuits that have considered the issue that significant privacy interests are implicated by the release of this information. See *Painting & Drywall Work Preservation Fund v. HUD*, 290 U.S. App. D.C. 243, 936 F.2d 1300, 1303 (D.C. Cir. 1991) ("Disclosure of the requested data would constitute [\*13] a substantial invasion of privacy."); *Hopkins v. HUD*, 929 F.2d 81, 87 (2d Cir. 1991) ("We have no doubt that individual private employees have a significant privacy interest in avoiding disclosure of their names and addresses, particularly where, as here, the names and addresses would be coupled with personal financial information.") (citations omitted).

The requesters argue that the workers' reasonable expectations that wage information will be kept confidential is weakened in this particular context because other federal [\*1484] and state laws compel disclosure of major aspects of the requested information. [HN5] However, "the privacy interest protected by Exemption 6 'encompasses the individual's control of information concerning his or her person.' An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *United States Dep't of Defense*, 114 S. Ct. at 1015 (citation omitted) (emphasis added).<sup>4</sup>

4 Requesters describe the Court's decision in *United States Dep't of Defense*, as predicated on the workers' decisions *not* to disclose their home addresses to their collective bargaining representative. 114 S. Ct. at 1015. The Court uses the workers' decision to demonstrate their "nontrivial privacy interest in nondisclosure" even if the information was available to the public in

some other form. *Id.* Under the facts of this case, we do not need such evidence to bolster our conclusion that workers have a significant privacy interest in the requested information regarding their wages.

[\*\*14] Moreover, the requesters' argument ignores the facts. The Davis-Bacon Act requires wage scales on federally-funded construction projects to be posted in a "prominent and easily accessible place at the site of work." 40 U.S.C. § 276a(a). The requesters, however, are not seeking disclosure of wage scales, but actual payroll information for individual workers. Since neither the hours worked by a particular individual, that individual's job classification, nor even the fact that an individual is working on a project is rendered public information by the Davis-Bacon Act, the requesters overestimate the intrusion into the workers' financial privacy worked by the posting requirement.

Recovery Fund also argues that the workers on the Hickam Air Force Base project have a diminished expectation of privacy because Hawaii's freedom of information statute makes certified payroll records for public works projects available for public inspection. *Hawaii Rev. Stat. § 92F-12(a)(9)*. Because construction workers usually work on a number of projects during any one year, Recovery Fund argues, some of their income information is already publicly available if they have [\*15] worked on any state public works projects. Thus, the additional invasion of privacy that results from disclosing payroll information on federal construction contracts is minimal. The answer to this is quite simple: the payroll records that the labor organizations here seek remain private because they contain information entirely distinct from Hawaii state contract payroll records.

[HN6] In sum, we conclude that workers on federally-funded construction projects have a substantial privacy interest in information tying their names and addresses to precise payroll figures.

## B

Having concluded that substantial privacy interests would be implicated by fulfillment of the FOIA requests at issue, we now consider whether FOIA recognizes a public interest in disclosure that might outweigh the intrusion that such disclosure would bring about. [HN7] FOIA only recognizes the public's interest in knowing "what their government is up to" and does not create an

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128 Lab. Cas. (CCH) P33,106; 94 Cal. Daily Op. Service 4595

venue to acquire information about other private parties held in the government's files. *Reporters Committee*, 489 U.S. at 772-73. <sup>5</sup> The requesters here both acknowledge that, in light of *Reporters* [\*16] *Committee*, they cannot request disclosure of the records on the basis that they would be useful in searching for violations of the Davis-Bacon Act by federal contractors. They accordingly frame the public benefit to be served by disclosure as an inquiry into the government's diligence in enforcing Davis-Bacon. [\*1485] They argue that this would fulfill the "basic purpose" of FOIA: to "open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 372.

5 *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus.*, Local 598 v. *Dep't of the Army, Corps of Engineers*, 841 F.2d 1459 (9th Cir. 1988), a case reviewing the district court's failure to award attorneys' fees to a labor organization after the district court awarded disclosure of certified payroll records, has been overruled by a pair of Supreme Court cases. *Local 598's* analysis was predicated on the assumption that "the public interest in the enforcement of labor laws" constitutes a cognizable public interest under FOIA. *Local 598*, 841 F.2d at 1462. Since *Local 598's* public interest analysis was not focused on whether the disclosed documents would reveal what the government is up to, its reasoning was implicitly overruled by *Reporters Committee* and explicitly rejected by *United States Dep't of Defense*, 114 S. Ct. at 1014.

[\*\*17] The circuits disagree about the appropriateness of such "derivative use" arguments in analyses of the FOIA privacy exemptions. *Compare Department of Veterans Affairs*, 958 F.2d at 512 (rejecting derivative-use argument is always appropriate) and *Hopkins*, 929 F.2d at 88 ("Disclosure of information affecting privacy interests is permissible only if the information reveals something directly about the character of a government agency or official.") (emphasis in original) with *Painting and Drywall*, 936 F.2d at 1303 (derivative use is a public interest cognizable under FOIA); see also *United States Dep't of Navy v. FLRA*, 975 F.2d 348, 355 n.3 (7th Cir. 1992) (agreeing with Second Circuit that "virtually any piece of information about a government employee could possibly provide some assistance to an investigative reporter").

The Supreme Court has avoided the issue. See *United States Dep't of State v. Ray*, 116 L. Ed. 2d 526, 112 S. Ct. 541, 549-50 (1991). If "derivative" public benefits are merely those [\*18] which require some tabulation of data released under FOIA, or perhaps some further research on the part of the requester, we see no reason why the extra effort required of the requester should, in every case, render a proffered public benefit more or less strong. The problem in the cases before us, however, is that the additional step requires direct contact with the employees whose payroll records are being sought. Any additional public benefit the requesters might realize through those contacts is inextricably intertwined with the invasions of privacy that those contacts will work.

On balance, we hold that release of the information sought by the requesters would constitute a "clearly unwarranted invasion of personal privacy" and the payroll records are therefore exempt from disclosure under FOIA. The requesters here have less intrusive means of procuring the information they seek than having the government disgorge private information from its files. They may pass out fliers at the beginning or end of the workday to workers on federal contracts, providing a form for the employees to self-report the information the requesters now seek to procure through FOIA. They may post signs [\*19] or advertisements soliciting information from workers about possible violations of the Davis-Bacon Act. Through any of these means, the requesters may procure the information they desire. Whether they seek to self-enforce the Davis-Bacon Act or to shed light on the government's enforcement of it, the government need not violate the privacy of these workers by disclosing unredacted payroll records.

We find the Sixth Circuit's discussion of privacy implications in an analogous situation instructive. In *Heights Community Congress v. Veterans Admin.*, 732 F.2d 526 (6th Cir.), cert. denied, 469 U.S. 1034, 83 L. Ed. 2d 398, 105 S. Ct. 506 (1984), that court held that a community group was not entitled to information about VA-insured loans from which the name and social security number of loan recipients would be redacted but property address and amount of loan would not be. <sup>6</sup> The court held that, on balance, Exemption 6 justified withholding of the information because its release would subject a veteran, who is not himself suspected of any wrongdoing, to involuntary personal involvement in [plaintiff's] [\*20] investigation of [racial] steering.

Even if [plaintiff] did not itself attempt to link addresses to specific veterans, any realtor or lender accused of steering by evidence compiled from individual VA loan reports could, if inclined to do so, certainly seek to examine the reports and counter the inference of steering by interrogating the individual buyers of the identified property. Holding a person's privacy hostage in this fashion is contrary . . . to the basic right in this nation simply to be left alone. Certainly nothing prevents [plaintiff] from publicly advertising its investigation and requesting any VA loan recipient who desires to cooperate with [plaintiff] to come [\*1486] forward if he so elects, or pursuing other less controversial avenues to obtain the information.

6 In an analysis cast into doubt by *Reporters Committee*, the court held that the purpose was proper under FOIA. *Heights Community Congress*, 732 F.2d at 530.

*Id.* at 530.

Finally, we [\*21] note that the requesters already have a substantial amount of the information they seek. In each case, the government has agreed to provide the certified payroll records with names, addresses, and social security numbers redacted. Thus, the requesters can compare job classifications to pay rates to determine if employees are being paid the prevailing wage. We recognize that the redacted records would not permit the requesters to determine whether the government was discovering violations in which contractors misclassify workers in order to pay a less-than-prevailing wage or where contractors properly classify and compensate the worker on paper but require him or her to pay a kickback to the contractor. We simply believe that, as a matter of law, the employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering "what the government is up to." <sup>7</sup> Disclosure would therefore be a "clearly unwarranted invasion of personal privacy" and the government was justified in withholding the names and addresses pursuant to Exemption 6 of FOIA.

7 The requesters cite *Dobronski v. FCC*, 17 F.3d 275 (9th Cir. 1994), as support for the importance of the information they seek. The interests weighed in that case, however, are dramatically different from those we weigh here today. In

*Dobronski*, the requester had received a "tip" that a particular assistant bureau chief for the FCC had improperly used sick leave. 17 F.3d at 277. The requester sought records that merely contained the dates on which the assistant bureau chief had taken sick leave. *Id.* at 279. Noting that the records did not disclose any information of a personal nature, such as the particular illness or condition necessitating the absence, the court in that instance found the balance weighed in favor of disclosure. *Id.* Like our decision in *Dobronski*, we believe a limited amount of information is appropriate for disclosure. For that reason, our decision is based in part on the government's willingness to provide information that will allow the requesters to compare job classifications to pay rates.

[\*\*22] IV

Because we hold that Exemption 6 justifies the government's action in providing redacted copies of certified payroll records requested by the labor organizations, we need not reach the Exemption 7(C) issue nor Rebound's appeal concerning attorneys' fees and additional remedies. The judgments of the district courts below are REVERSED.

CONCUR BY: NORRIS

CONCUR

Norris, J., concurring:

I believe the critical question at issue is whether FOIA requires the government to release the payroll records with the individual employees' home addresses included. Plaintiffs want the addresses to enable them to contact the workers directly to check the accuracy of the records submitted to the government, and to determine whether the agencies are doing a satisfactory job in discovering reporting violations such as job misclassifications and secret kickback arrangements.

I come down on the side of nondisclosure because I believe that the release of home addresses would constitute a "clearly unwarranted" privacy invasion, outweighing even the public's substantial interest in release of these records. <sup>1</sup> The invasion of privacy that results from disclosure of one's home address is far more substantial than, say, [\*23] the disclosure of one's

phone number. In contrast to phone numbers, home addresses are not routinely available. Many people choose to list their addresses in the phone book, but many do not. The reason is simple: publishing your phone number may invite annoying phone calls, but publishing your address can lead to far more intrusive breaches of privacy, [\*1487] and even physical danger.<sup>2</sup>

1 I do not say, however, that the disclosure of home addresses would never be warranted. If the public interest is sufficiently strong, the balance may favor disclosure. But before a court authorizes the release of home addresses, it should first examine whether the proposed public benefit could be served just as well by disclosure of other identifying information. For instance, plaintiffs here may be able to accomplish their public monitoring purpose just as well (or very nearly so) by relying on the workers' telephone numbers, rather than their home addresses.

2 For the same reason, telephone directory assistance normally will not provide callers with addresses for the telephone numbers the callers have requested.

[\*\*24] Although I agree with the result reached by the majority, I have two concerns with the majority's analysis. First, I am troubled by the manner in which the majority evaluates the privacy interests at stake in this case. While I do not dispute that the workers have a significant privacy interest in their home addresses, I question the way the majority assesses the consequences of disclosure in reaching its conclusion that disclosure would invade "substantial" privacy interests, and thereby produce a "clearly unwarranted invasion of personal privacy." Majority Opinion at 6474, 6476.

The majority's evaluation of the privacy invasion rests, in large part, on the generic statement by the government that disclosure would produce a "barrage of mailings" that would seriously intrude upon the privacy of the construction workers. See Majority Opinion at 6472-74. The majority buys into this assumption even though the government has failed to produce any evidence to suggest that these construction workers constitute a targeted group who would be exploited by mass marketers. In my view, the government may not rely on mere conjecture in describing the extent of the privacy invasion that would [\*25] result. It must show that there is a "substantial probability" that the

information would be used in the intrusive manner that is being suggested. *National Ass'n of Retired Fed. Employees v. Horner*, 279 U.S. App. D.C. 27, 879 F.2d 873, 878 (D.C. Cir. 1989); see also *United States Dep't of State v. Ray*, 116 L. Ed. 2d 526, 112 S. Ct. 541, 548 n.12 (1991) (citing *Horner* and rejecting a per se rule against disclosing lists of names and other identifying information). A vague assertion that someone *might* be interested in reaching persons identified on government records is not enough; there must be some sort of evidentiary showing to suggest the sorts of intrusive consequences that would likely flow from disclosure. See *Horner*, 879 F.2d at 876, 878; *Birch v. United States Postal Serv.*, 256 U.S. App. D.C. 128, 803 F.2d 1206, 1209 (D.C. Cir. 1986) ("The agency bears the burden of setting forth 'a relatively detailed justification' for assertion of an exemption . . .").

My second concern regards the [\*26] majority's valuation of the public interest at stake. The Supreme Court recently reaffirmed the fundamental principle that "disclosure, not secrecy, is the dominant objective of [FOIA]." *United States Dep't of Defense v. FLRA*, 127 L. Ed. 2d 325, 114 S. Ct. 1006, 1012 (1994) (quoting *Department of Air Force v. Rose*, 425 U.S. 352, 361, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976) (emphasis added)). In place of the strong presumption in favor of disclosure, the majority discounts the public interest by adopting a per se rule that such an interest is minimal if it depends on "derivative use" that requires any contact with individuals. While I agree with the majority that there should be no per se rule barring courts from considering the "derivative uses" of information as part of the public benefits to disclosure,<sup>3</sup> see Majority Opinion at 6476, I disagree with the majority's apparent suggestion courts should ignore the public benefits of disclosure if such benefits depend on a "derivative use" that involves direct contact with individuals. *Id.* at 6476. As the majority states: [\*27]

3 In the past three years, the Supreme Court has twice declined to adopt such a per se rule, see *United States Dep't of Defense*, 127 L. Ed. 2d 325, 114 S. Ct. 1006; *Ray*, 112 S. Ct. at 549, and I see no justification for adopting it as the law of our circuit. It is often impossible to find out what one document means unless it is read in a larger context, supplemented with information that comes from other sources. See *Painting and Drywall Work Preservation Fund v. HUD*, 290

*U.S. App. D.C. 243, 936 F.2d 1300, 1303 (D.C. Cir. 1991)* ("We have recognized that a relevant public interest could exist where the names of current workers might provide leads for an investigative reporter seeking to ferret out what government is up to.") (quotation marks omitted). Confining the public interest inquiry to the four corners of the document requested would be unnecessarily formalistic and inconsistent with FOIA's general policy of full agency disclosure.

[\*\*28] The problem in the cases before us . . . is that the additional step requires direct contact with the employees whose payroll records are being sought. Any additional public benefit the requesters might realize through those contacts is *inextricably intertwined* with the invasions of privacy that those contacts will work.

[\*1488] *Id.* (emphasis added). The fact that the public benefits of disclosure may be "intertwined" with the privacy interests should in no way diminish the importance of the public interest asserted. The public interest inquiry and the privacy inquiry are two separate strands of the analysis: the strength of the public interest has no bearing on the strength of the privacy interest, nor does the privacy interest affect the weight of the public interest. To be sure, the two factors ultimately get

balanced against one another, but they must be evaluated independently. To mix the two factors together *before* the balancing phase unnecessarily confuses the analysis.

In short, the majority's adoption of a *per se* rule against considering derivative uses in weighing the public interest conflicts with FOIA's "strong presumption in favor of disclosure." *Ray*, 112 S. Ct. at 547. [\*\*29] By confining the public interest to the information contained in the four corners of agency records, the majority resets the FOIA scales heavily against disclosure.<sup>4</sup>

4 This is particularly troubling in light of the majority's inclusion on the privacy side of the scales consideration of any derivative use to which the disclosed information might be put. See Majority Opinion at 6472-73 (disclosure might lead to a barrage of mailings by merchandisers). As Justice Scalia noted in his separate opinion in *Ray*, "derivative use on the public-benefits side, and derivative use on the personal-privacy side must surely go together (there is no plausible reason to allow it for one and bar it for the other)." 112 S. Ct. at 551 (Scalia, J., concurring in the judgment and concurring in part).



WOODY VOINCHEE, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION,  
Defendant.

Civil Action No. 95-01944 (CRR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

940 F. Supp. 323; 1996 U.S. Dist. LEXIS 14217

September 23, 1996, Decided  
September 24, 1996, FILED

DISPOSITION:      [\*\*1] Defendant's Motion for Summary Judgment is GRANTED. Any and all other outstanding motions are rendered and declared Moot. The above-captioned case is DISMISSED from the dockets of this Court.

LexisNexis(R) Headnotes

*Administrative Law > Governmental Information > Freedom of Information > Enforcement > Burdens of Proof*

*Civil Procedure > Summary Judgment > Standards > Appropriateness*

*Civil Procedure > Summary Judgment > Standards > Genuine Disputes*

[HN1] Summary judgment must be granted to the movant if it has shown, when the facts are viewed in the light most favorable to the nonmovant, that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In Freedom of Information Act (FOIA) cases, the burden of justifying nondisclosure lies with the defendant agency, and summary judgment in its favor is appropriate only where the agency can prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the FOIA's inspection requirements.

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > General Overview*

*Civil Procedure > Summary Judgment > Supporting Materials > Affidavits*

*Environmental Law > Litigation & Administrative Proceedings > Judicial Review*

[HN2] When an agency seeks summary judgment on the basis of a Freedom of Information Act exemption, it can discharge its burden by providing a relatively detailed justification, specifically identifying the reasons why a particular justification is relevant and correlating those claims with the particular part of a withheld document to which they apply. The court may grant summary judgment solely on the basis of affidavits or declarations that explain how requested information falls within a claimed exemption if the affidavits or declarations are sufficiently detailed, nonconclusory, and submitted in good faith. Still, the court must review de novo an agency's decision to exempt information. *5 U.S.C.S. § 522(a)(4)(B)*.

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Foreign Policy & National Defense*  
*Military & Veterans Law > Defense Powers > National Defense*

[HN3] Exemption (b)(1) of the Freedom of Information Act protects materials specifically authorized under

criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy which are in fact properly classified pursuant to such Executive order. 5 U.S.C.S. § 552(b)(1).

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Foreign Policy & National Defense*

*Administrative Law > Governmental Information > Freedom of Information > Enforcement > Vaughn Indexes*

*Governments > Federal Government > Domestic Security*

[HN4] Vaughn declarations filed in Freedom of Information Act (FOIA) cases involving classified documents inherently require a degree of generalization and such generalization does not violate the FOIA. Furthermore, courts generally have deferred to agency expertise in national security matters.

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Internal Personnel Rules*

[HN5] Exemption (b)(2) of the Freedom of Information Act (FOIA) protects information related solely to the internal personnel rules and practices of an agency. 5 U.S.C.S. § 552(b)(2). To fall within exemption (b)(2), the material withheld must be predominantly internal and its disclosure significantly risk circumvention of agency regulations or statutes. Whether there is any public interest in disclosure is irrelevant. This is because the concern in such cases is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Statutory Exemptions*

*Administrative Law > Governmental Information > Freedom of Information > Disclosure Requirements > General Overview*

*Criminal Law & Procedure > Grand Juries > Secrecy > Freedom of Information Act*

[HN6] Exemption (b)(3) of the Freedom of Information Act allows for the withholding of information specifically exempted from disclosure by statute, provided the statute requires matters to be withheld from the public in such a manner as to leave no discretion on the issue, or

establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C.S. § 552(b)(3).

*Administrative Law > Governmental Information > Freedom of Information > General Overview*  
*Criminal Law & Procedure > Grand Juries > Secrecy > Freedom of Information Act*

[HN7] Rule 6(e) of the Federal Rules of Criminal Procedure prohibits the disclosure of matters which occur before grand juries, except under narrow circumstances. Fed. R. Crim. P. 6(e).

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Medical & Personnel Files*

[HN8] Under Freedom of Information Act exemption (b)(6), material may be withheld which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C.S. § 552(b)(6).

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Medical & Personnel Files*

[HN9] To warrant protection under exemption (b)(6) of the Freedom of Information Act, information must, as a threshold matter, be contained within personnel and medical files and similar files. 5 U.S.C.S. § 552(b)(6). The protection of an individual's privacy interests surely is not intended to turn upon the label of the file which contains the damaging information. All information which applies to a particular individual meets the threshold requirement for exemption (b)(6) protection.

*Administrative Law > Governmental Information > Freedom of Information > General Overview*  
*Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Free Press > General Overview*

*Constitutional Law > Substantive Due Process > Privacy > Personal Information*

[HN10] A defendant claiming exemption under 5 U.S.C.S. § 552(b)(6) must establish that the disclosure of the records at issue would constitute a clearly unwarranted invasion of personal privacy, which requires a balancing of the public's right to disclosure against the individual's right to privacy. The concept of "public

interest" under the Freedom of Information Act (FOIA) has been sharply limited to the core purpose for which it was enacted: to shed light on an agency's performance of its statutory duties. Information that does not directly reveal the operation or activities of the federal government falls outside the ambit of the public interest that the FOIA was enacted to serve.

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview*  
[HN11] Exemption (b)(7) of the Freedom of Information Act protects investigatory records compiled for law enforcement purposes, but is limited to those records the production of which would cause one of a variety of enumerated harms. 5 U.S.C.S. § 552(b)(7).

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Personal Information*  
*Constitutional Law > Substantive Due Process > Privacy > Personal Information*  
[HN12] Exemption (b)(7)(C) of the Freedom of Information Act provides protection from disclosure to investigatory material when such disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C.S. § 552(b)(7)(C). It is generally recognized that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation. As such, the court is required to balance the personal privacy interests of the named individuals with the interest of the public in the disclosure of such information.

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Personal Information*  
[HN13] Exemption (b)(7)(C) of the Freedom of Information Act, codified at 5 U.S.C.S. § 552(b)(7)(C), is designed to protect not only against the danger of physical harm but also against those invasions of personal privacy likely to be associated with the stigma frequently attached to law enforcement proceedings and investigations.

*Administrative Law > Governmental Information >*

*Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Confidential Source*  
[HN14] Exemption (b)(7)(D) of the Freedom of Information Act (FOIA) is designed to provide protection for investigatory material which could reasonably be expected to disclose the identity of a confidential source, or information furnished by a confidential source. 5 U.S.C.S. § 552 (b)(7)(D). Exemption (b)(7)(D) has long been recognized as affording the most comprehensive protection of all of the FOIA's law enforcement exemptions. Not all information received from sources in the course of criminal investigations, however, is entitled to a presumption of confidentiality. Source confidentiality must be determined on a case-by-case basis, recognizing that it may be true that most individual sources will expect confidentiality. Thus the government must show either that a source received express assurances of confidentiality or that circumstances existed from which an inference of confidentiality can be assumed.

*Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview*  
[HN15] Exemption (b)(7)(E) of the Freedom of Information Act provides for the withholding of investigatory records compiled for law enforcement purposes, the disclosure of which would reveal techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. 5 U.S.C.S. § 552(b)(7)(E).

#### COUNSEL: APPEARANCES

FOR THE PLAINTIFF: Woody Voinche, pro se, Marksville, Louisiana.

FOR THE DEFENDANT: Fred E. Haynes, Assistant United States Attorney, with whom Eric H. Holder, Jr., United States Attorney, appeared on the briefs, Washington, D.C.

JUDGES: CHARLES R. RICHEY, UNITED STATES DISTRICT JUDGE

OPINION BY: CHARLES R. RICHEY

OPINION

[\*325] MEMORANDUM OPINION OF CHARLES R. RICHEY

UNITED STATES DISTRICT JUDGE

INTRODUCTION

Before the Court in the above-entitled case are the defendant's Motion for Summary Judgment; <sup>1</sup> the plaintiff's Opposition thereto; and the defendant's Reply. This case arises out of the defendant's decision to withhold entire documents and portions of documents responsive to the plaintiff's Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, request seeking material that had been previously released to Alexander Charns and referenced in Mr. Charns' book, *Cloak and Gavel*.

1 In its Motion for Summary Judgment, the defendant incorporates its Motion for Partial Summary Judgment, filed June 17, 1996.

[\*\*2] The defendant has moved for summary judgment on the grounds that it has released all material responsive to the plaintiff's request except information properly withheld pursuant to various exceptions to the FOIA. Upon consideration of the filings by the parties, the entire record herein, the law applicable thereto, and for the reasons set forth below, the defendant's Motion for Summary Judgment shall be granted.

BACKGROUND

On September 23, 1993, the plaintiff sent a letter to the defendant, the Federal Bureau of Investigation ("FBI"), requesting information concerning alleged FBI wiretaps at the United States Supreme Court, "overhears" of conversations Justices had with third parties, former FBI chief, J. Edgar Hoover's official and confidential ("O & C") files, and other surveillance issues. On May 24, 1994, the defendant released 152 pages of documents to the plaintiff relating to the Supreme Court and the judiciary. The defendant, however, withheld documents and redacted material from the pages released to the plaintiff pursuant to FOIA exemptions (b)(1); (b)(2); (b)(3); (b)(6); (b)(7)(C); (b)(7)(D) and (b)(7)(E). See 5 U.S.C.A. §§ 552(b)(1), (2), (3), (6), (7)(C), [\*\*3] (7)(D) and (7)(E) (1996). The plaintiff appealed the decision to withhold and redact portions of documents. On October 16, 1995, having received no decision on his appeal, the plaintiff filed the above-entitled action requesting the Court to order the defendant to produce the withheld

records to the plaintiff and to award costs and attorney's fees.

The parties agreed that the defendant would file *Vaughn* indices <sup>2</sup> explaining the basis for its withholding of documents, the first of which was filed on April 29, 1996. A status conference in the case was held on May 31, 1996, at which time the plaintiff withdrew his request for production the Hoover O & C files, since those documents were available for review at the FBI Headquarters' reading room. Also at that time, the plaintiff stated that he would not contest the defendant's withholdings that were addressed in the declarations of the FBI Special Agents filed on April 29, 1996. The defendant filed further *Vaughn* indices on June 14, 1996.

2 *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820, 827 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 39 L. Ed. 2d 873, 94 S. Ct. 1564 (1974).

[\*\*4] On June 17, 1996, the defendant filed a Motion for Partial Summary Judgment. <sup>3</sup> After the nonexempt portions of a final outstanding document -- previously referred to the CIA for review -- were released, the defendant filed a Motion for Summary Judgment on July 1, 1996.

3 The Motion was for partial summary judgment because the declarations attached to it did not address one document that had been referred by the FBI to the CIA for a response to the plaintiff.

DISCUSSION

I. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE PLAINTIFF HAS NOT RAISED ANY GENUINE ISSUES OF MATERIAL FACT AND THE DEFENDANT PROPERLY ASSERTED FOIA EXEMPTIONS (b)(1), (b)(2), (b)(3), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E) TO JUSTIFY ITS WITHHOLDING OF DOCUMENTS.

[HN1] Summary judgment must be granted to the movant if it has shown, when the facts are viewed in the light most favorable to the nonmovant, that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Fed. R. Civ. [\*\*5] P. 56(c); see Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In FOIA [\*327] cases, the burden of justifying nondisclosure lies with the defendant

agency, and summary judgment in its favor is appropriate only where the agency can "prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [FOIA's] inspection requirements." *National Cable Television Ass'n, Inc. v. FCC*, 156 U.S. App. D.C. 91, 479 F.2d 183, 186 (D.C. Cir. 1973).

The defendant bases its withholding of the records responsive to the plaintiff's FOIA request on Exemptions (b)(1), (b)(2), (b)(3), (b)(6), and (b)(7). [HN2] When an agency seeks summary judgment on the basis of a FOIA exemption, it can discharge its burden by providing a relatively detailed justification, "specifically identifying the reasons why a particular justification is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Central, Inc. v. Department of the Air Force*, 184 U.S. App. D.C. 350, 566 F.2d 242, 251 (D.C. Cir. 1977). The Court may grant summary judgment solely on the basis of affidavits or declarations [\*\*6] that explain how requested information falls within a claimed exemption if the affidavits or declarations are sufficiently detailed, nonconclusory, and submitted in good faith. *Goland v. CIA*, 197 U.S. App. D.C. 25, 607 F.2d 339, 352 (D.C. Cir. 1978), cert. denied, 445 U.S. 927, 63 L. Ed. 2d 759, 100 S. Ct. 1312 (1980); *Military Audit Project v. Casey*, 211 U.S. App. D.C. 135, 656 F.2d 724, 738 (D.C. Cir. 1981). Still, the Court must review de novo an agency's decision to exempt information. 5 U.S.C.A. § 522(a)(4)(B) (1996).

Consistent with the liberal treatment generally afforded pro se litigants, the defendant has provided notice to the plaintiff in its Motion for Summary Judgment that any factual assertions contained in the affidavits and other attachments in support of the Motion will be accepted by the Court as true unless the plaintiff submits his own affidavit or other documentary evidence contradicting such assertions. Defendant's Motion for Summary Judgment at 2; see *Neal v. Kelly*, 295 U.S. App. D.C. 350, 963 F.2d 453, 456 (D.C. Cir. 1992); Local Rule 108; *Fed. R. Civ. P.* 56(e). Notwithstanding the provision of adequate notice to the plaintiff by the [\*\*7] defendant of the operation of the summary judgment rule, the plaintiff's documentary evidence in support of his Opposition to the defendant's Motion fails to contradict many of the factual assertions underlying the various grounds upon which the defendant's Motion rests. Accordingly, the Court must accept as true the

uncontroverted allegations.

#### A. Exemption (b)(1) was properly asserted.

[HN3] Exemption (b)(1) protects materials "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order." 5 U.S.C.A. § 552(b)(1). In this instance, the defendant relies on Executive Order 12,958, which became effective on October 14, 1995, and which governs the classification and protection of: (a) information that would reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States; and [\*\*8] (b) information that, if revealed, would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States. Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (1995).

Special Agent Richard D. Davidson, a supervisor in the defendant's Document Classification Unit and designated by the U.S. Attorney General as a classification and declassification authority, was given by the defendant the task of reviewing all classified documents responsive to the plaintiff's FOIA request and justifying the withholding of some of those documents based on Exemption (b)(1) through his declarations, filed with this Court on April 29 and June 14, 1996.

In his declarations, Special Agent Davidson explains in detail the analysis he applied in determining which documents or portions of documents should be withheld on the basis of Exemption (b)(1). First & Sec. Davidson Decs. PP 3-17. His declarations also state that the information in the documents withheld [\*\*328] under Exemption (b)(1) has been properly classified and its release would harm the national interest. *Id.* at P 6.

The majority of documents [\*\*9] withheld in this case under Exemption (b)(1) were classified in their entirety and, thus, were completely withheld from release. See Sec. Davidson Dec., App. A. The entries in Special Agent Davidson's *Vaughn* index relating to these documents are vague as to the nature of the documents or

information withheld. As a result, the indices relating to classified documents do not provide much help to the Court in reviewing *de novo* the defendant's decision to withhold the documents. In his Opposition to the defendant's Motion for Partial Summary Judgment, the plaintiff argues that these index entries are insufficient in that they are "only generalized theoretical discussion[s] of possible harms which could result from release of information." Plaintiff's Opposition to the FBI's Motion for Partial Summary Judgment; Motion for In Camera Review and to Allow Interrogatories at 1 ("Plaintiff's Opposition") (quoting *Wiener v. FBI*, 943 F.2d 972, 973-74 (9th Cir. 1991)). The plaintiff questions whether the defendant could have further segregated exempt from nonexempt materials. Plaintiff's Opposition at 2.

In isolation, the Court finds these *Vaughn* index entries troubling, given [\*\*10] the difficulty such entries create for the Court in conducting a *de novo* review of the defendant's decision to withhold the indexed documents. However, in light of: (1) Special Agent Davidson's thorough declarations; (2) the Department of Justice's Department Review Committee's review of Special Agent Davidson's classification determinations, see Sec. Davidson Dec. P 5; and (3) the defendant's *Vaughn* index entries relating to non-classified material withheld from the plaintiff, which unquestionably provide adequate detail for such *de novo* review; the Court will accept as true Special Agent Davidson's assertion that the defendant provided as much information in its *Vaughn* index as it could about documents classified in their entirety without compromising national interests. [HN4] *Vaughn* declarations filed in FOIA cases involving classified documents inherently require a degree of generalization and such generalization does not violate the FOIA. See, e.g., *Maynard v. CIA*, 986 F.2d 547, 557 (1st Cir. 1993).

Furthermore, courts generally have deferred to agency expertise in national security matters, see, e.g., *Miller v. Casey*, 235 U.S. App. D.C. 11, 730 F.2d 773, 776 [\*\*11] (D.C. Cir. 1984); *Taylor v. Department of the Army*, 221 U.S. App. D.C. 325, 684 F.2d 99, 109 (D.C. Cir. 1982) (classification affidavits are entitled to the "utmost deference"). This Court, too, is reluctant to substitute its judgment in place of the agency's "unique insights" in areas of national defense and foreign relations. *Krikorian v. Department of State*, 299 U.S. App. D.C. 331, 984 F.2d 461, 464-65 (D.C. Cir. 1993) (acknowledging agency's "unique insights" in areas of

national defense and foreign relations). Therefore, in light of the Davidson declarations and the defendant's responsible and thorough preparation of *Vaughn* indices not involving documents classified in their entirety, the Court concludes that the defendant's invocation of exemption (b)(1) was proper, despite the vague descriptions in certain *Vaughn* index entries.

#### B. The Defendant Properly Asserted Exemption (b)(2).

[HN5] Exemption (b)(2) protects information "related solely to the internal personnel rules and practices of an agency." 5 U.S.C.A. § 552(b)(2). To fall within exemption (b)(2), the material withheld must be "predominantly internal" and its disclosure "significantly risk [\*\*12] circumvention of agency regulations or statutes." *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 216 U.S. App. D.C. 232, 670 F.2d 1051, 1073-74 (1981). Under the *Crooker* test, whether there is any public interest in disclosure is irrelevant. See *Kaganove v. EPA*, 856 F.2d 884, 888-89 (7th Cir. 1988), cert. denied, 488 U.S. 1011, 102 L. Ed. 2d 789, 109 S. Ct. 798 (1989); *Institute for Policy Studies v. Department of the Air Force*, 676 F. Supp. 3, 5 (D.D.C. 1987). This is because the concern in such cases is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection." *Crooker*, 670 F.2d at 1053.

In this case, the defendant asserted Exemption (b)(2) for permanent confidential [\*329] source symbol numbers, file numbers, and certain manuals containing detailed discussions regarding techniques used by professional gamblers to evade prosecution. First *Kelso* Dec. PP 33-36; Sec. *Kelso* Dec. PP 33-38. In addition, the FBI withheld information relating to the security of the Supreme Court building and the security procedures for Supreme Court Justices. *Id.* at P 39.

The Court has reviewed the declarations of Special Agent John M. Kelso, Jr. and the *Vaughn* indices [\*\*13] prepared by him. Finding that Special Agent Kelso adequately explained the processes by which he reviewed documents for responsiveness and determined which material should be withheld under Exemption (b)(2), and satisfied with the information about the withheld material provided in the aforementioned *Vaughn* indices, the Court finds that the defendant properly asserted Exemption (b)(2).

#### C. The Defendant Properly Asserted Exemption

(b)(3).

[HN6] Exemption (b)(3) allows for the withholding of information specifically exempted from disclosure by statute, provided the statute (a) requires matters to be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C.A. § 552(b)(3).

The defendant withheld the name of an individual subpoenaed to appear before the Grand Jury, along with the time, place and the particular case. First Kelso Dec. PP 38-39. The defendant argues that releasing this information would violate the secrecy of the Grand Jury proceedings and reveal the scope and directions of the proceedings. *Id.* at P 38.

The Court agrees. [HN7] [\*\*14] Rule 6(e) of the Federal Rules of Criminal Procedure prohibits the disclosure of matters which occur before Grand Juries, except under narrow circumstances inapplicable here. *F. R. Crim. P. 6(e)*. Accordingly, the Court finds that the defendant properly exempted the information relating to a Grand Jury proceeding from disclosure pursuant to the FOIA.

#### D. The Defendant Properly Asserted Exemption (b)(6).

[HN8] Under FOIA Exemption (b)(6), material may be withheld which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.A. § 552(b)(6). The Court finds that Exemption (b)(6) was correctly asserted to protect the names and identifying information with regard to individuals and that summary judgment in favor of the defendant on this claim is appropriate.

Here, the defendant invoked Exemption (b)(6) to withhold information, including: (1) the names and initials of Special Agents and support employees; (2) the names and addresses of individuals who wrote to J. Edgar Hoover, to Justices of the Supreme Court, or to members of Congress expressing their views on some of the Supreme Court's decisions or on particular Justices; the names and identifying data of individuals [\*\*15] mentioned during the course of routine day-to-day matters with the FBI; (4) the names and titles of Supreme Court employees and applicants; (5) the names of non-federal law enforcement officers; (6) the names of

non-FBI federal government employees; (7) and the names and identifying data of possible candidates for vacancies on the Supreme Court. First & Sec. Kelso Decs. PP 40-49.

[HN9] To warrant protection under Exemption (b)(6), information must, as a threshold matter, be contained within "personnel and medical files and similar files." 5 U.S.C.A. § 552(b)(6). As the Supreme Court noted in *Department of State v. Washington Post Co.*, 456 U.S. 595, 72 L. Ed. 2d 358, 102 S. Ct. 1957 (1982), the protection of an individual's privacy interests "surely was not intended to turn upon the label of the file which contains the damaging information." *Id.* at 601 (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)). It held, rather, that all information which "applies to a particular individual" meets the threshold requirement for Exemption (b)(6) protection. *Id.* at 602. The defendant asserts Exemption (b)(6) to protect the names and identifying data of specific individuals, and, thus, has met the threshold requirement. [\*\*16] [HN10]

[\*330] The defendant also must establish that the disclosure of the records at issue "would constitute a clearly unwarranted invasion of personal privacy," which requires a balancing of the public's right to disclosure against the individual's right to privacy. See *Department of the Air Force v. Rose*, 425 U.S. 352, 372, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976). Because the release of the names and identifying features of individuals withheld would serve no articulable public interest, the Court finds that the defendant's assertion of Exemption (b)(6) in order to protect the privacy interests of the individuals at issue was correct.

The Supreme Court has sharply limited the concept of "public interest" under the FOIA to the core purpose for which it was enacted: to "shed [ ] light on an agency's performance of its statutory duties." *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989).<sup>4</sup> Information that does not directly reveal the operation or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Id.* at 775; see *Andrews v. Department* [\*\*17] *of Justice*, 769 F. Supp. 314, 317 (E.D. Mo. 1991) ("The nature of the public interest inquiry under the FOIA . . . turns on the relationship of the information to the basic purpose of the FOIA, which is 'to open agency action to the light of public scrutiny.'" (quoting

*Reporters Comm.*, 489 U.S. at 772) (quoting *Rose*, 425 U.S. at 372)).

4 On September 17, 1996, both houses of Congress passed a bill that amends the FOIA to effectively overrule the U.S. Supreme Court's holding in *Reporters Comm.* The amendment clarifies that "the information collected by federal agencies is subject to release for any public or private purpose, as long as it does not conflict with the existing exemptions." Ira Chinoy, *Amendment Seeks to Open Public Files to Digital Diggers*, Washington Post, September 18, 1996 at A17; see *Electronic Freedom of Information Act Amendments of 1996*, H.R. 3802, 104th Cong., 2d Sess. (1996). The President had not signed the bill into law as of the date of this Memorandum Opinion.

[\*\*18] The information withheld in this case under Exemption (b)(6) consists entirely of names and identifying data of individuals. See First & Sec. Kelso Decs. PP 40-49. There is no reason to believe that the public will obtain a better understanding of the workings of various agencies by learning the identities of FBI Special Agents and support personnel, private citizens who wrote to government officials, non-federal law enforcement officers, non-FBI federal employees or candidates for vacancies on the U.S. Supreme Court. Accordingly, in light of the countervailing privacy interests of third parties about whom personal information is contained in the requested records, the Court finds that the defendant properly asserted Exemption (b)(6). The Court therefore shall grant the defendant's Motion for Summary Judgment with regard to their assertion of Exemption (b)(6) to withhold requested information.

#### E. The Defendant Properly Asserted Exemption (b)(7).

The defendant also withholds certain information from release to the plaintiff under three subsections of Exemption (b)(7) of the FOIA. [HN11] Exemption (b)(7) protects "investigatory records compiled for law enforcement purposes," but [\*\*19] is limited to those records the production of which would cause one of a variety of enumerated harms. 5 U.S.C.A. § 552(b)(7).

#### 1. Exemption (b)(7)(C).

[HN12] Exemption (b)(7)(C) provides protection from disclosure to investigatory material when such disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C.A. § 552(b)(7)(C) (1996). "It is generally recognized that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." *Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987); see also *Lesar v. Department of Justice*, 204 U.S. App. D.C. 200, 636 F.2d 472, 488 (D.C. Cir. 1980). As such, the Court is required to balance the personal privacy interests of the named individuals with the interest of the public in the disclosure of such information. *Reporters Comm.*, 489 U.S. at 762; [\*\*331] *Stern v. FBI*, 237 U.S. App. D.C. 302, 737 F.2d 84, 91 (D.C. Cir. 1984).

In this case, the defendant asserts that information in investigatory material has been withheld from the plaintiff under Exemption (b)(7)(C) because it consists of: (1) the names and initials of [\*\*20] Special Agents and support personnel of the FBI; (2) the names and identifying data of third parties of investigative interest; (3) the names and identifying data of non-FBI federal government employees; (4) the names of employees of the Supreme Court who provided information in connection with their employment; (5) the names and identifying data of third parties mentioned during the course of interviews or contacts with third parties and toward whom no investigative effort was directed; (6) the name and title of an individual who, by reason of his employment, was in a position to furnish information concerning the investigation of the alleged attempt to sell advance opinions of the U.S. Supreme Court; (7) the names and identifying data of third parties interviewed about then-Governor Earl Warren and some of his associates; and (8) the names and identifying data of an individual who corresponded with the FBI regarding Justice Warren. The nature of the withholdings under Exemption (b)(7)(C) and the privacy interests at stake are explained in detail in the April 29 and June 14, 1996 declarations of Special Agent John D. Kelso, Jr. First Kelso Dec. PP 51-69; Second Kelso Dec. PP 51 to [\*\*21] 67.

[HN13] Exemption (b)(7)(C) is designed to protect not only against the danger of physical harm but also against those invasions of personal privacy likely to be associated with the stigma frequently attached to law enforcement proceedings and investigations. Given the

strong privacy interest inherent in law enforcement records, and the absence of a "significant and compelling" public interest in disclosing the names of individuals associated with, or the focus of, FBI investigations referenced in the withheld material, the Court finds that the defendant properly asserted Exemption (b)(7)(C). See *SafeCard Servs., Inc. v. SEC*, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1206 (D.C. Cir. 1991) ("We now hold categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.") Satisfied with the declarations of Special Agent Kelso and the *Vaughn* indices as they relate to information withheld pursuant to Exemption (b)(7)(C), the Court shall grant the defendant summary judgment with respect to its assertion of that exemption to the FOIA.

## 2. Exemption (b)(7)(D).

[HN14] Exemption (b)(7)(D) is designed to provide protection for investigatory material which "could reasonably be expected to disclose the identity of a confidential source, . . . or . . . information furnished by a confidential source." 5 U.S.C.A. § 552 (b)(7)(D). Exemption (b)(7)(D) has long been recognized as affording the most comprehensive protection of all of the FOIA's law enforcement exemptions. See *Irons v. FBI*, 880 F.2d 1446, 1452 (1st Cir. 1989) (en banc). Not all information received from sources in the course of criminal investigations, however, is entitled to a presumption of confidentiality. *United States Department of Justice v. Landano*, 508 U.S. 165, 124 L. Ed. 2d 84, 113 S. Ct. 1014 (1993). In *Landano*, the U.S. Supreme Court ruled that source confidentiality must be determined on a case-by-case basis, recognizing that it may be true that most individual sources will expect confidentiality. See *id.* at 176. Thus, under *Landano*, the government must show either that a source received express assurances of confidentiality or that circumstances existed from [\*\*23] which an inference of confidentiality can be assumed.

Applying the analysis of *Landano* to the information withheld in this case pursuant to Exemption (b)(7)(D), the Court finds that the defendant adequately showed that each individual whose name or identifying data was withheld received an express or implied assurance of

confidentiality.<sup>5</sup> First Kelso Dec. [\*\*332] PP 73-82; Sec. Kelso Dec. PP 71-88. Accordingly, the Court shall grant the defendant's Motion for Summary Judgment with regard to their withholding of information relating to the identity of sources given a promise of confidentiality.

5 In fact, the name and identifying data of only one individual -- a person with whom Justice William O. Douglas associated -- was withheld based on an implied promise of confidentiality. Sec. Kelso Dec. PP 79-83. The defendant has provided sufficient detail of the circumstances around the individual's interaction with the FBI to establish that the individual at issue had an expectation of confidentiality as to his or her relationship with the FBI, even though the promise of confidentiality was not explicitly expressed.

## [\*\*24] 3. Exemption (b)(7)(E).

[HN15] Exemption (b)(7)(E) provides for the withholding of investigatory records compiled for law enforcement purposes, the disclosure of which would reveal "techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C.A. § 552(b)(7)(E). The defendant has invoked this exemption to withhold copies of the "Criminal Intelligence Digest," a publication prepared to render assistance and guidance to FBI personnel, and information relating to an analysis of safety procedures afforded to the Supreme Court and its Justices. Sec. Kelso Dec. PP 89-90.

The defendant also invoked Exemption (b)(2) as a basis for withholding this material, which the Court, *supra* I.B., found an appropriate action. Nonetheless, for the same reasons the materials may be withheld under Exemption (b)(2), the Court finds that the materials also should be afforded protection from disclosure pursuant to Exemption (b)(7)(E).

## CONCLUSION

Upon consideration of the defendant's Motion for Summary Judgment, which incorporates by reference its earlier Motion for Partial Summary Judgment, [\*\*25] the plaintiff's Opposition thereto, the defendant's Reply thereto, the declarations of Special Agents Davidson and Kelso and accompanying *Vaughn* indices, and for all of

the foregoing reasons, the Court finds that the defendant is entitled to judgment in its favor as a matter of law.<sup>6</sup> As such, the Court shall issue an Order of even date herewith consistent with the foregoing Memorandum Opinion.

6 Because the Court finds that the defendant is entitled to judgment as a matter of law based on the *Vaughn* indices provided, the Court rejects the plaintiffs argument in his Opposition that discovery and *in camera* review of the documents is necessary to a proper resolution of this matter. Accordingly, the Court declares moot in its Order of even date herewith the plaintiffs motions for such relief.

CHARLES R. RICHEY

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons articulated in the Court's Memorandum Opinion of even date herewith, it is, by the Court, this 23rd day of September, 1996,

ORDERED [\*\*26] that the defendant's Motion for Summary Judgment shall be, and hereby is, GRANTED; and, it is

FURTHER ORDERED that any and all other outstanding motions shall be, and hereby are, rendered and declared Moot; and, it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED from the dockets of this Court.

CHARLES R. RICHEY

UNITED STATES DISTRICT JUDGE

Print

San Francisco Charter

## ARTICLE XV: ETHICS

Sec. 15.100.	Ethics Commission.
Sec. 15.101.	Executive Director and Commission Staff.
Sec. 15.102.	Rules and Regulations.
Sec. 15.103.	Conflict of Interest.
Sec. 15.105.	Suspension and Removal.
Sec. 15.107.	Reporting of Campaign Financing.

### SEC. 15.100. ETHICS COMMISSION.

The Ethics Commission shall consist of five members who shall serve six-year terms; provided that the first five commissioners to be appointed to take office on the first day of February, 2002 shall by lot classify their terms so that the term of one commissioner shall expire at 12:00 o'clock noon on each of the second, third, fourth, fifth and sixth anniversaries of such date, respectively; and, on the expiration of these and successive terms of office, the appointments shall be made for six-year terms.

The Mayor, the Board of Supervisors, the City Attorney, the District Attorney and the Assessor each shall appoint one member of the Commission. The member appointed by the Mayor shall have a background in public information and public meetings. The member appointed by the City Attorney shall have a background in law as it relates to government ethics. The member appointed by the Assessor shall have a background in campaign finance. The members appointed by the District Attorney and Board of Supervisors shall be broadly representative of the general public.

In the event a vacancy occurs, the officer who appointed the member vacating the office shall appoint a qualified person to complete the remainder of the term. Members of the Commission shall serve without compensation. Members of the Commission shall be officers of the City and County, and may be removed by the appointing authority only pursuant to Section 15.105.

No person may serve more than one six-year term as a member of the Commission, provided that persons appointed to fill a vacancy for an unexpired term with less than three years remaining or appointed to an initial term of three or fewer years shall be eligible to be appointed to one additional six-year term. Any term served before the effective date of this Section shall not count toward a member's term limit. Any person who completes a term as a Commissioner shall be eligible for reappointment six years after the expiration of his or her term. Notwithstanding any provisions of this Section or any other section of the Charter to the contrary, the respective terms of office of the members of the Commission who shall hold office on the first day of February, 2002, shall expire at 12 o'clock noon on said date, and the five persons appointed as members of the Commission as provided in this Section shall succeed to said offices on said first day of February, 2002, at 12 o'clock noon; provided that if any appointing authority has not made a new appointment by such date, the sitting member shall continue to serve until replaced by the new appointee.

During his or her tenure, members and employees of the Ethics Commission are subject to the following restrictions:

- (a) Restrictions on Holding Office. No member or employee of the Ethics Commission may hold any other City or County office or be an officer of a political party.
- (b) Restrictions on Employment. No member or employee of the Ethics Commission may be a registered lobbyist or campaign consultant, or be employed by or receive gifts or other compensation from a registered lobbyist or campaign consultant. No member of the Ethics Commission may hold employment with the City and County and no employee of the Commission may hold any other employment with the City and County.
- (c) Restrictions on Political Activities. No member or employee of the Ethics Commission may participate in any campaign supporting or opposing a candidate for City elective office, a City ballot measure, or a City officer running for any elective office. For the purposes of this section, participation in a campaign includes but is not limited to making contributions or soliciting contributions to any committee within the Ethics Commission's jurisdiction, publicly endorsing or urging endorsement of a candidate or ballot measure, or participating in decisions by organizations to participate in a campaign.

The Commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the Commission's duties or exercise of its powers.

(Amended November 2001; November 2002; November 2003)

### SEC. 15.101. EXECUTIVE DIRECTOR AND COMMISSION STAFF.

The Commission shall appoint and may remove an Executive Director. The Executive Director shall have a background in campaign finance, public information and public meetings and the law as it relates to governmental ethics. The Executive Director shall be the chief executive of the department and shall have all the powers provided for department heads. Subject to the civil service provisions of this Charter, the Executive Director shall have the power to appoint and remove other employees of the Commission. In addition to any other conflict of interest provisions applicable to City employees, the Executive Director and all other employees of the Commission shall be subject to the conflict of interest provisions in Section 15.100, except that the post-employment restrictions contained therein shall apply only to the Executive Director and management-level employees.

(Amended November 2001)

### SEC. 15.102. RULES AND REGULATIONS.

The Commission may adopt, amend and rescind rules and regulations consistent with and related to carrying out the purposes and provisions of this Charter and ordinances related to campaign finances, conflicts of interest, lobbying, campaign consultants and governmental ethics and to govern procedures of the Commission. In addition, the Commission may adopt rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records. The Commission shall transmit to the Board of Supervisors rules and regulations adopted by the Commission within 24 hours of their adoption. A rule or regulation adopted by the Commission shall become effective 60 days after the date of its adoption unless before the expiration of this 60-day period two-thirds of all members of the Board of Supervisors vote to veto the rule or regulation.

The City Attorney shall be the legal advisor of the Commission.

Any ordinance which the Supervisors are empowered to pass relating to conflicts of interest, campaign finance, lobbying, campaign consultants or governmental ethics may be submitted to the electors at the next succeeding general election by the Ethics Commission by a four-fifths vote of all its members.

(Amended November 2001)

### SEC. 15.103. CONFLICT OF INTEREST.

Public office is a public trust and all officers and employees of the City and County shall exercise their public duties in a manner consistent with this trust. The City may adopt conflict of interest and governmental ethics laws to implement this provision and to prescribe penalties in addition to discipline and removal authorized in this Charter. All officers and employees of the City and County shall be subject to such conflict of interest and governmental ethics laws and the penalties prescribed by such laws.

(Amended November 2003)

### SEC. 15.104.

(Repealed November 2003)

### SEC. 15.105. SUSPENSION AND REMOVAL.

(a) ELECTIVE AND CERTAIN APPOINTED OFFICERS. Any elective officer, and any member of the Airport Commission, Asian Art Commission, Civil Service Commission, Commission on the Status of Women, Golden Gate Concourse Authority Board of Directors, Health Commission, Human Services Commission, Juvenile Probation Commission, Municipal Transportation Agency Board of Directors, Port Commission, Public Utilities Commission, Recreation and Park Commission, Fine Arts Museums Board of Trustees, Taxi Commission, War Memorial and Performing Art Center Board of Trustees, Board of Education or Community College Board is subject to suspension and removal for official misconduct as provided in this section. Such officer may be suspended by the Mayor and the Mayor shall appoint a qualified person to discharge the duties of the office during the period of suspension. Upon such suspension, the Mayor shall immediately notify the Ethics Commission and Board of Supervisors thereof in writing and the cause thereof, and shall present written charges against such suspended officer to the Ethics Commission and Board of Supervisors at or prior to their next regular meetings following such suspension, and shall immediately furnish a copy of the same to such officer, who shall have the right to appear with counsel before the Ethics Commission in his or her defense. The Ethics Commission shall hold a hearing not less than five days after the filing of written charges. After the hearing, the Ethics Commission shall transmit the full record of the hearing to the Board of Supervisors with a recommendation as to whether the charges should be sustained. If, after reviewing the complete record, the charges are sustained by not less than a three-fourths vote of all members of the Board of Supervisors, the suspended officer shall be removed from office; if not so sustained, or if not acted on by the Board of Supervisors within 30 days after the receipt of the record from the Ethics Commission, the suspended officer shall thereby be reinstated.

(b) BUILDING INSPECTION COMMISSION, PLANNING COMMISSION, BOARD OF APPEALS, ELECTIONS COMMISSION, ETHICS COMMISSION, AND ENTERTAINMENT COMMISSION. Members of the Building Inspection Commission, the Planning Commission, the Board of Appeals, the Elections Commission, the Ethics Commission, and the Entertainment Commission may be suspended and removed pursuant to the provisions of subsection (a) of this section except that the Mayor may initiate removal only of the Mayor's appointees and the appointing authority shall act in place of the Mayor for all other appointees.

(c) REMOVAL FOR CONVICTION OF A FELONY CRIME INVOLVING MORAL TURPITUDE.

(i) Officers Enumerated in Subsections (a) and (b).

(A) An appointing authority must immediately remove from office any official enumerated in subsections (a) or (b) upon:

- (i) a court's final conviction of that official of a felony crime involving moral turpitude; and
- (ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the official was convicted warrants removal.

(B) For the purposes of this subsection, the Mayor shall act as the appointing authority for any elective official.

(C) Removal under this subsection is not subject to the procedures in subsections (a) and (b) of this section.

(2) Other Officers and Employees.

(A) At will appointees. Officers and employees who hold their positions at the pleasure of their appointing authority must be removed upon:

- (i) a final conviction of a felony crime involving moral turpitude; and
- (ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the appointee was convicted warrants removal.

(B) For cause appointees. Officers and employees who by law may be removed only for cause must be removed upon:

- (i) a final conviction of a felony crime involving moral turpitude; and
- (ii) a determination made by the Ethics Commission, after a hearing, that the crime for which the appointee was convicted warrants removal.

(3) Penalty for Failure to Remove. Failure to remove an appointee as required under this subsection shall be official misconduct.

(d) DISQUALIFICATION.

(1) (A) Any person who has been removed from any federal, state, County or City office or employment upon a final conviction of a felony crime involving moral turpitude shall be ineligible for election or appointment to City office or employment for a period of ten years after removal.

(B) Any person removed from any federal, state, County or City office or employment for official misconduct shall be ineligible for election or appointment to City office or employment for a period of five years after removal.

(2) (A) Any City department head, board, commission or other appointing authority that removes a City officer or employee from office or employment on the grounds of official misconduct must invoke the disqualification provision in subsection (d)(1)(B) and provide notice of such disqualification in writing to the City officer or employee.

(B) Upon the request of any former City officer or employee, the Ethics Commission may, after a public hearing, overturn the application of the disqualification provision of subsection (d)(1)(B) if (i) the decision that the former officer or employee engaged in official misconduct was not made after a hearing by a court, the Board of Supervisors, the Ethics Commission, an administrative body, an administrative hearing officer, or a labor arbitrator; and (ii) if the officer or employee does not have the right to appeal his or her restriction on holding future office or employment to the San Francisco Civil Service Commission.

(e) **OFFICIAL MISCONDUCT.** Official misconduct means any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers and including any violation of a specific conflict of interest or governmental ethics law. When any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office.

(Amended November 2001; March 2002, November 2003)

#### **SEC. 15.106.**

(Repealed November 2003)

#### **SEC. 15.107. REPORTING OF CAMPAIGN FINANCING.**

The Board of Supervisors shall, by ordinance, prescribe requirements for campaign contributions and expenditures and any limitations thereon with respect to candidates for elective office and ballot measures in the City and County.

#### **SEC. 15.108.**

(Repealed November 2003)

## APPENDIX B

SUNSHINE ORDINANCE  
TASK FORCE



March 3, 2014

San Francisco Ethics Commission  
25 Van Ness Avenue, Suite 220  
San Francisco, CA 94102

**Re: Sunshine Ordinance Task Force (SOTF) referral to the Ethics Commission  
– Dominic Maionchi against Phil Ginsburg, General Manager, Recreation and  
Park Department (Sunshine Ordinance Complaint No. 12058)**

Dear Ethics Commission:

On May 1, 2013, the Task Force heard Complaint No. 12058, by Dominic Maionchi (Complainant) against Recreation and Parks Department (Respondent). The Complainant alleged that the Recreation and Parks Department failed to timely respond to his November 22, 2012, records request, and that they also failed to provide unredacted copies of the records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

Dominic Maionchi appeared before the Task Force and presented his claim. Respondent, Olive Gong, Custodian of Records, Recreation and Park Department presented the department's defense. The issue in the case was whether the Recreation and Park Department violated Sections 67.21 and 67.24 of the Ordinance and/or Sections 6253 of the California Public Records Act.

Based on the testimony and evidence presented, the Task Force found the testimony of Complainant to be persuasive and finds Sections 67.26 of the Sunshine Ordinance to be applicable in this case. The Task Force does not find testimony provided by the Respondent persuasive with regard to alleged violation of Section 67.26. An Order of Determination was issued on June 12, 2013.

At the July 16, 2013, Compliance and Amendments Committee Mr. Maionchi provided an update on the June 12, 2013, Order of Determination from the May 1, 2013, SOTF meeting. Mr. Maionchi stated that the Respondent provided the same documents provided in original records request, which do not comply with the Order of Determination. Olive Gong, Recreation and Park (Respondent), stated the California

<http://www.sfgov.org/sunshine/>

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SAN FRANCISCO  
ETHICS COMMISSION

Government Code upholds the department's decision to redact documents provided to the Complainant and not disclose others.

Member Knee, seconded by Member Grant, moved to refer the matter back to the Task Force with a recommendation of referral to Ethics Commission for enforcement for violating Sunshine Ordinance Sections 67.34, 67.26 and 67.21(i); for the Chair to draft a letter to the City Attorney stating the Recreation and Park's attorney is in violation of Sunshine Ordinance Section 67.21 (i).

At the November 6, 2013, SOTF meeting Mr. Maionchi provided an update and overview of the complaint. Olive Gong, Recreation and Park (Respondent), provided an overview of Recreation and Park's defense; reiterating the department is not in violation according to their interpretation and the department policy to not disclose addresses.

**Member Knee, seconded by Member Oka, moved to find the Recreation and Park Department in violation of the Sunshine Ordinance as determined in the Order of Determination (Sections 67.21(e), 67.24(g) and 67.34); referral to the Ethics Commission for enforcement specifically naming Phil Ginsburg, Director, Recreation and Park Department responsible.**

This request and referral is made under Section 67.30(c) whereby the Task Force shall make referrals to a municipal office with enforcement power under the Sunshine Ordinance or under the California Public Records Act and the Brown Act whenever it concludes that any person has violated any provisions of this Ordinance or the Acts.

Thank you for your timely attention to this matter. A description of the Task Force hearing, violations found, and decision are described in the attached Order of Determination. Please contact the Sunshine Ordinance Task Force Administrator at [sotf@sfgov.org](mailto:sotf@sfgov.org) or (415) 554-7724 with any questions or concerns.



Kitt Grant, Chair  
Sunshine Ordinance Task Force

Encl.

c: Dominic Maionchi, Complainant  
Olive Gong, Recreation and Park Department  
Phil Ginsburg, General Manager, Recreation and Park Department  
Nicholas Colla, Deputy City Attorney  
Jerry Threet, Deputy City Attorney

**ORDER OF DETERMINATION**

June 12, 2013

**DATE THE DECISION ISSUED**

May 1, 2013

DOMINIC MAIONCHI V. RECREATION AND PARKS DEPARTMENT (CASE NO. 12058)

BY

SAN FRANCISCO  
ETHICS COMMISSION

14 MAR -3 PM 2:47

FILED

**FACTS OF THE CASE**

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2012 records request, and that they also failed to provide unredacted copies of the records requested.

**COMPLAINT FILED**

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21 (b), 67.24(e)(1), and 67.24(f) of the Ordinance.

**HEARING ON THE COMPLAINT**

On May 1, 2013, Complainant, Dominic Maionchi appeared before the Task Force and presented his claim. Respondent, Olive Gong, Custodian of Records, Recreation and Park Department presented Recreation and Park Department's defense.

The issue in the case is whether Recreation and Park Department violated Sections 67.21 and 67.24 of the Ordinance and/or Sections 6253 of the California Public Records Act.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based on the testimony and evidence presented the Task Force finds that the testimony of Complainant, Dominic Maionchi to be persuasive and finds that Section 67.26 of the Sunshine Ordinance to be applicable in this case. The Task Force does not find the testimony provided by Respondent, Olive Gong persuasive with regard to alleged violation of Section 67.26.

**DECISION AND ORDER OF DETERMINATION**

The Task Force finds that Recreation and Park Department violated Section 67.26 of the Sunshine Ordinance for illegal redaction of personal information contained in public records. The agency shall release the unredacted records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on July 16, 2013.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on May 1, 2013, by the following vote: (Knee / Hyland)

Ayes: Knee, Pilpel, Sims, Hyland, Oka, Fischer, Grant

Noes: David

Absent: Washburn



Kitt Grant, Chair  
Sunshine Ordinance Task Force

c: Jerry Threet, Deputy City Attorney  
Dominic Maionchi, Complaint  
Olive Gong, Recreation and Park Department, Respondent

## Argumedo, Catherine

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From: Ethics Commission  
Sent: Monday, March 03, 2014 2:28 PM  
To: Argumedo, Catherine; Chatfield, Garrett  
Subject: FW: SOTF - Referral of Sunshine Ordinance Complaint No. 13013 to the Ethics Commission  
Attachments: Referral 12058.pdf

From: SOTF  
Sent: Monday, March 03, 2014 2:26 PM  
To: Ethics Commission  
Cc: Calla, Nicholas; Threet, Jerry; St.Croix, John; Gong, Olive; Ginsburg, Phil; dm567@pacbell.net; Calvillo, Angela  
Subject: SOTF - Referral of Sunshine Ordinance Complaint No. 13013 to the Ethics Commission

Dear Ethics Commission:

Please find attached a referral from the Sunshine Ordinance Task Force to the Ethics Commission in regards to Complaint No. 13013 -

Dominic Maionchi against Phil Ginsburg, General Manager, Recreation and Park Department.

Victor Young

Administrator  
Sunshine Ordinance Task Force  
1 Dr. Carlton B. Goodlett Pl., Room 244  
San Francisco CA 94102  
phone 415-554-7724  
fax 415-554-5163

Complete a Board of Supervisors Customer Satisfaction form by clicking the link below.

<http://www.sfbos.org/index.aspx?page=104>

*Disclosures: Personal information that is provided in communications to the Board of Supervisors is subject to disclosure under the California Public Records Act and the San Francisco Sunshine Ordinance. Personal information provided will not be redacted. Members of the public are not required to provide personal identifying information when they communicate with the Board of Supervisors and its committees. All written or oral communications that members of the public submit to the Clerk's Office regarding pending legislation or hearings will be made available to all members of the public for inspection and copying. The Clerk's Office does not redact any information from these submissions. This means that personal information—including names, phone numbers, addresses and similar information that a member of the public elects to submit to the Board and its committees—may appear on the Board of Supervisors website or in other public documents that members of the public may inspect or copy.*

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## Victor Young

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## SUNSHINE ORDINANCE TASK FORCE CITY AND COUNTY OF SAN FRANCISCO AGENDA

Hearing Room 408  
City Hall, 1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

May 1, 2013 – 4:00 PM

### Regular Meeting

#### 1. CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES

Seat 1	(Vacant)	Seat 8	Todd David
Seat 2	Richard Knee (Hold Over)	Seat 9	Chris Hyland
Seat 3	Kitt Grant – Chair	Seat 10	Louise Fischer – Vice Chair
Seat 4	(Vacant)	Seat 11	Bruce Oka
Seat 5	Allyson Washburn (Hold Over)		
Seat 6	David Pilpel	Ex-officio	Angela Calvillo
Seat 7	David Sims	Ex-officio	(Vacant)

2. Supervisor of Records Report – Presented by Paula Jesson, Deputy City Attorney.  
(Discussion and Action) (approximately 30 minutes) (attachment)
3. **Public Comment:** Members of the public may address the Sunshine Ordinance Task Force (SOTF) on matters that are within SOTF's jurisdiction, but not on today's agenda. (No Action) *Public comment shall be taken at 5:00 pm or as soon thereafter as possible.*
4. File No. **12058:** Complaint filed by Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders. (attachment)
  - (a) Determination of jurisdiction on complaint filed by Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders. (approximately 5 minutes) (Discussion and Action)
  - (b) Hearing on complaint filed by Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders. (approximately 45 minutes) (Discussion and Action)

5. **\*File No. 13007:** Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide an opportunity for the public to address Board at their January 7, 2013 meeting. *(attachment)*
  - (a) Determination of jurisdiction on complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide an opportunity for the public to address Board at their January 7, 2013 meeting. *(approximately 5 minutes) (Discussion and Action)*
  - (b) Hearing on complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide an opportunity for the public to address Board at their January 7, 2013 meeting. *(approximately 45 minutes) (Discussion and Action)*
6. **File No. 13008:** Complaint filed by William Clark against Tom DeCaigny, Director of Cultural Affairs for allegedly failing to include language in the Arts Commission's agenda to discuss and approve budgets for FY 2013-14 and FY 2014-15. *(attachment)*
  - (a) Determination of jurisdiction on complaint filed by William Clark against Tom DeCaigny, Director of Cultural Affairs for allegedly failing to include language in the Arts Commission's agenda to discuss and approve budgets for FY 2013-14 and FY 2014-15. *(approximately 5 minutes) (Discussion and Action)*
  - (b) Hearing on complaint filed by William Clark against Tom DeCaigny, Director of Cultural Affairs for allegedly failing to include language in the Arts Commission's agenda to discuss and approve budgets for FY 2013-14 and FY 2014-15. *(approximately 45 minutes) (Discussion and Action)*
7. **\*File No. 13022:** Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly walking out before public comment at their January 7, 2013 meeting. *(attachment)*
  - (a) Determination of jurisdiction on complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly walking out before public comment at their January 7, 2013 meeting. *(approximately 5 minutes) (Discussion and Action)*
  - (b) Hearing on complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly walking out before public comment at their January 7, 2013 meeting. *(approximately 45 minutes) (Discussion and Action)*
8. **\*File No. 13023:** Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide audio of their January 7, 2013 meeting. *(attachment)*
  - (a) Determination of jurisdiction on complaint filed by Charles Pitts Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide audio of their January 7, 2013 meeting. *(approximately 5 minutes) (Discussion and Action)*

- (b) Hearing on complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide audio of their January 7, 2013 meeting. *(approximately 45 minutes) (Discussion and Action)*
- 9 Discussion regarding possible motion on state budget proposals regarding: 1) increasing court record access fees; and 2) halting State reimbursements that assist local governments in complying with the California Public Records Act. *(approximately 15 minutes) (Discussion and Action) (attachment)*
- 10 Discussion regarding proposed Resolution to Mayor Edwin Lee and the Board of Supervisors to: 1) communicate to the Governor and San Francisco's State Legislative representatives their opposition to State budget proposals that would grievously abridge the public's right to know by increasing court record access fees and halting state reimbursements that assist local governments in complying with the California Public Records Act; and 2) to instruct the City's legislative representative in the State Capitol to work diligently to persuade the Governor and the Legislature to delete/defeat said proposals. *(approximately 15 minutes) (Discussion and Action) (attachment)*
- 11. **Approval of Minutes from the November 7, 2012, Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
- 12. **Approval of Minutes from the December 5, 2012, Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
- 13. **Approval of Minutes from the December 12, 2012, Special Meeting.** *(approximately 5 minutes) (Action) (attachment)*
- 14. **Approval of Minutes from the January 16, 2013 Special Meeting.** *(approximately 5 minutes) (Action) (attachment)*
- 15. **Approval of Minutes from the February 6, 2013 Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
- 16. **Approval of Minutes from the March 6, 2013 Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
- 17. **Approval of Minutes from the April 3, 2013 Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
- 18. **Report: Compliance and Amendments Committee meeting of April 16, 2013.** *(approximately 5 minutes) (Discussion)*
- 19. **Report: Education, Outreach and Training Committee meeting of April 29, 2013.** *(approximately 5 minutes) (Discussion)*
- 20. **Administrator's Report.** *(approximately 5 minutes) (Discussion)*

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\*Complainant requested the complaints within Complaint No. 13007 to be heard separately.

21. Announcements, Comments, Questions, and Future Agenda Items. (*approximately 10 minutes*) (Discussion and Action)
22. ADJOURNMENT

### Agenda Item Information

Each item on the agenda may include: 1) Department or Agency cover letter and/or report; 2) Public correspondence; 3) Other explanatory documents. For more information concerning agendas, minutes, and meeting information, such as these documents, please contact the SOTF Clerk, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco, CA 94102.

Audio recordings of the meeting of the Sunshine Ordinance Task Force are available at:

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For information concerning Sunshine Ordinance Task Force please contact by e-mail [sotf@sfgov.org](mailto:sotf@sfgov.org) or by calling (415) 554-7724.

### Public Comment

Public Comment will be taken before or during the Committee's consideration of each agenda item. Speakers may address the Task Force for up to three minutes on that item. During General Public Comment, members of the public may address the Task Force on matters that are within the Task Force's jurisdiction and are not on the agenda. Any person speaking during a public comment period may supply a brief written summary of their comments, which shall, if no more than 150 words, be included in the official file.

Each member of the public will be allotted the same maximum number of minutes to speak as set by the Chair at the beginning of each item, excluding persons requested by the Task Force to make presentations.

Each member of the public who is unable to attend the public meeting or hearing may submit to the City, by the time the hearing begins, written comments regarding the subject of the meeting or hearing. These comments will be made a part of the official public record.

### Hearing Procedures

- |                                                                                                                 |                      |
|-----------------------------------------------------------------------------------------------------------------|----------------------|
| 1. Complainant presents his/her facts and evidence                                                              | 5 minutes            |
| Other parties of Complainant present facts and evidence                                                         | Up to 3 minutes each |
| 2. City responds                                                                                                | 5 minutes            |
| Other parties of City respond                                                                                   | Up to 3 minutes each |
| <i>Above total speaking times for Complainant and City to be the same.</i>                                      |                      |
| 3. Matter is with the Task Force for discussion and questions.                                                  |                      |
| 4. Respondent and Complainant presents clarification/rebuttal                                                   | 3 minutes            |
| 5. Matter is with the Task Force for motion and deliberation.                                                   |                      |
| 6. Public comment (Excluding Complainant & City response, witnesses)                                            | Up to 3 minutes each |
| 7. Vote by Task Force (Public comment at discretion of chair on new motion and/or on new motion if vote fails.) |                      |

Note: Time must be adhered to. If a speaker is interrupted by questions, the interruption does not count against his/her time.

### Disability Access

The hearing rooms in City Hall are wheelchair accessible. Assistive listening devices for the hearing rooms are available upon request with the SOTF Clerk. The nearest accessible BART station is Civic Center (Market/Grove/Hyde Streets). Accessible MUNI Metro lines are the F, J, K, L, M, N, T (exit at Civic Center or Van Ness Stations). MUNI bus lines also serving the area are the 5, 6, 9, 19, 21, 47, 49, 71, and 71L. For more information about MUNI accessible services, call (415) 701-4485. There is accessible parking in the vicinity of City Hall at Civic Center Plaza and adjacent to Davies Hall and the War Memorial Complex. Accessible curbside parking is available on Dr. Carlton B. Goodlett Place and Grove Street.

The following services are available on request 48 hours prior to the meeting; except for Monday meetings, for which the deadline shall be 4:00 p.m. of the last business day of the preceding week: For American sign language interpreters or the use of a reader during a meeting, a sound enhancement system, and/or alternative formats of the agenda and minutes, please contact the SOTF Clerk at (415) 554-7724 to make arrangements for the accommodation. Late requests will be honored, if possible.

In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

### Know Your Rights Under the Sunshine Ordinance

Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils, and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

For more information on your rights under the Sunshine Ordinance (Chapter 67 of the San Francisco Administrative Code) or to report a violation of the ordinance, contact: Sunshine Ordinance Task Force, 1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco, CA 94102; phone (415) 554-7724; fax (415) 554-7854; or email [sotf@sfgov.org](mailto:sotf@sfgov.org).

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### Cell Phones, Pagers and Similar Sound-Producing Electronic Devices

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### Lobbyist Registration and Reporting Requirements

Individuals and entities that influence or attempt to influence local legislative or administrative action may be required by the San Francisco Lobbyist Ordinance [SF Campaign & Governmental Conduct Code §2.100, et. seq] to register and report lobbying activity. For more information about the Lobbyist Ordinance, please contact the Ethics Commission at: 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102; telephone (415) 581-3100; fax (415) 252-3112; web site [www.sfgov.org/ethics](http://www.sfgov.org/ethics)



**SUNSHINE ORDINANCE TASK FORCE**  
**Compliance and Amendments Committee**  
**CITY AND COUNTY OF SAN FRANCISCO**  
**AGENDA**

Hearing Room 408  
City Hall, 1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

**July 16, 2013 – 4:00 P.M.**

**Regular Meeting**

Members: Allyson Washburn (Chair),  
Richard Knee, Kitt Grant

1. **CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES**
2. **Adoption of June 18, 2013, regular meeting minutes** (Discussion and Action)  
(attachment) (approximately 5 minutes)
3. **File No. 12058:** Hearing on the status of the Order of Determination of Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.  
(Discussion and Action) (attachment) (approximately 30 minutes)
4. **Public Comment** Members of the public may address the Compliance and Amendments Committee on matters that are within Sunshine Ordinance Task Force's jurisdiction but not on today's agenda. (No Action). Public Comment shall be taken one hour after meeting convenes.
5. **Administrator's Report** (Discussion and Action) (approximately 5 minutes)
6. **Announcements, Comments, Questions, and Future Agenda Items** (No Action)
7. **ADJOURNMENT**

### Agenda Item Information

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Each member of the public will be allotted the same maximum number of minutes to speak as set by the Chair at the beginning of each item, excluding persons requested by the Task Force to make presentations.

Each member of the public who is unable to attend the public meeting or hearing may submit to the City, by the time the hearing begins, written comments regarding the subject of the meeting or hearing. These comments will be made a part of the official public record.

### Hearing Procedures

- |                                                                                                                 |                      |
|-----------------------------------------------------------------------------------------------------------------|----------------------|
| 1. Complainant presents his/her facts and evidence                                                              | 5 minutes            |
| Other parties of Complainant present facts and evidence                                                         | Up to 3 minutes each |
| 2. City responds                                                                                                | 5 minutes            |
| Other parties of City respond                                                                                   | Up to 3 minutes each |
| <i>Above total speaking times for Complainant and City to be the same.</i>                                      |                      |
| 3. Matter is with the Task Force for discussion and questions.                                                  |                      |
| 4. Respondent and Complainant presents clarification/rebuttal                                                   | 3 minutes            |
| 5. Matter is with the Task Force for motion and deliberation.                                                   |                      |
| 6. Public comment (Excluding Complainant & City response, witnesses)                                            | Up to 3 minutes each |
| 7. Vote by Task Force (Public comment at discretion of chair on new motion and/or on new motion if vote fails.) |                      |

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### **Lobbyist Registration and Reporting Requirements**

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## Full Packet



# SUNSHINE ORDINANCE TASK FORCE CITY AND COUNTY OF SAN FRANCISCO AGENDA

Hearing Room 408  
City Hall, 1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

November 6, 2013 – 4:00 PM

## Regular Meeting

### 1. CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES

Seat 1	<i>(Vacant)</i>	Seat 8	Todd David
Seat 2	Richard Knee <i>(Hold Over)</i>	Seat 9	Chris Hyland
Seat 3	Kitt Grant – <b>Chair</b>	Seat 10	Louise Fischer – <b>Vice Chair</b>
Seat 4	<i>(Vacant)</i>	Seat 11	Bruce Oka <i>(Hold Over)</i>
Seat 5	Allyson Washburn <i>(Hold Over)</i>		
Seat 6	David Pilpel	Ex-officio	Angela Calvillo
Seat 7	David Sims	Ex-officio	<i>(Vacant)</i>

2. **Proposed Sunshine Ordinance Task Force Records Retention Schedule:** The Task Force shall prepare, maintain and adopt a records retention and destruction policy as provided in §8.3 of the San Francisco Administrative Code. *(approximately 30 minutes)*  
*(Discussion and Possible action) (attachment)*
3. **Pending Complaints and 45-Day Hearing Rule - Scheduling of Complaints.**  
*(approximately 30 minutes) (Discussion and Possible action)*
4. **File No. 12058:** The Compliance and Amendments Committee has referred File No. 12058, Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders. *(approximately 30 minutes) (Discussion and Possible action) (attachment)*
5. **File No. 12059:** The Compliance and Amendments Committee has referred File No. 12059, Supreet Pabla, SEIU Local 1021 against Human Services Agency for allegedly failing to provide records requested relevant to the representation of the bargaining unit's employees. *(approximately 30 minutes) (Discussion and Possible action) (attachment)*
6. **Public Comment:** Members of the public may address the Sunshine Ordinance Task Force (SOTF) on matters that are within SOTF's jurisdiction, but not on today's agenda.  
*(No Action) Public comment shall be taken at 5:00 pm or as soon thereafter as possible.*

7. **File No. 13025:** Complaint filed by William Clark, against the Arts Commission for allegedly failing to provide of a written opinion from the City Attorney advising the Arts Commission on its current suspension and revocation procedures. *(attachment)*
- (a) Determination of jurisdiction on complaint filed by William Clark, against the Arts Commission for allegedly failing to provide of a written opinion from the City Attorney advising the Arts Commission on its current suspension and revocation procedures. *(approximately 5 minutes) (Discussion and Action)*
  - (b) Hearing on complaint filed by William Clark, against the Arts Commission for allegedly failing to provide of a written opinion from the City Attorney advising the Arts Commission on its current suspension and revocation procedures. *(approximately 45 minutes) (Discussion and Action)*
8. **File No. 13026:** Complaint filed by Ray Hartz, Jr., against Angela Calvillo, Clerk of the Board for allegedly violating Sunshine Ordinance §67.16 Minutes thereby censoring and abridging public comment violating §67.15 Public Testimony. *(attachment)*
- (a) Determination of jurisdiction on complaint filed by Ray Hartz, Jr., against Angela Calvillo, Clerk of the Board for allegedly violating Sunshine Ordinance §67.16 Minutes thereby censoring and abridging public comment violating §67.15 Public Testimony. *(approximately 5 minutes) (Discussion and Action)*
  - (b) Hearing on complaint filed by Ray Hartz, Jr., against Angela Calvillo, Clerk of the Board for allegedly violating Sunshine Ordinance §67.16 Minutes thereby censoring and abridging public comment violating §67.15 Public Testimony. *(approximately 45 minutes) (Discussion and Action)*
9. **File No. 13027:** Complaint filed by Ray Hartz, Jr., against Paula Jesson, District City Attorney for allegedly violating §67.21(i), by providing legal counsel for City employees having custody of public records for proposes of denying access to the public. *(attachment)*
- (a) Determination of jurisdiction on complaint filed by Ray Hartz, Jr., against Paula Jesson, Office of the City Attorney for allegedly violating §67.21(i), by providing legal counsel for City employees having custody of public records for proposes of denying access to the public. *(approximately 5 minutes) (Discussion and Action)*
  - (b) Hearing on complaint filed by Ray Hartz, Jr., against Paula Jesson, Office of the City Attorney for allegedly violating §67.21(i), by providing legal counsel for City employees having custody of public records for proposes of denying access to the public. *(approximately 45 minutes) (Discussion and Action)*

10. **File No. 13028:** Complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly enforcing illegal group guidelines. *(attachment)*
  - (a) Determination of jurisdiction on complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly enforcing illegal group guidelines. *(approximately 5 minutes) (Discussion and Action)*
  - (b) Hearing on complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly enforcing illegal group guidelines. *(approximately 45 minutes) (Discussion and Action)*
11. **File No. 13029:** Complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly denying the public to record the May 21, 2013 meeting. *(attachment)*
  - (a) Determination of jurisdiction on complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly denying the public to record the May 21, 2013 meeting. *(approximately 5 minutes) (Discussion and Action)*
  - (b) Hearing on complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly denying the public to record the May 21, 2013 meeting. *(approximately 45 minutes) (Discussion and Action)*
12. **Approval of Minutes from the March 6, 2013 Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
13. **Approval of Minutes from the April 3, 2013 Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
14. **Approval of Minutes from the May 1, 2013 Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
15. **Approval of Minutes from the June 5, 2013 Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
16. **Approval of Minutes from the July 9, 2013 Special Meeting.** *(approximately 5 minutes) (Action) (attachment)*
17. **Approval of Minutes from the August 7, 2013 Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
18. **Approval of Minutes from the September 4, 2013 Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*
19. **Approval of Minutes from the October 2, 2013 Regular Meeting.** *(approximately 5 minutes) (Action) (attachment)*

- 20. Administrator's Report. *(approximately 5 minutes) (Discussion)*
- 21. Announcements, Comments, Questions, and Future Agenda Items. *(approximately 10 minutes) (Discussion and Action)*
- 22. ADJOURNMENT

## Agenda Item Information

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## Hearing Procedures

- |    |                                                                                                              |                      |
|----|--------------------------------------------------------------------------------------------------------------|----------------------|
| 1. | Complainant presents his/her facts and evidence                                                              | 5 minutes            |
|    | Other parties of Complainant present facts and evidence                                                      | Up to 3 minutes each |
| 2. | City responds                                                                                                | 5 minutes            |
|    | Other parties of City respond                                                                                | Up to 3 minutes each |
|    | <i>Above total speaking times for Complainant and City to be the same.</i>                                   |                      |
| 3. | Matter is with the Task Force for discussion and questions.                                                  |                      |
| 4. | Respondent and Complainant presents clarification/rebuttal                                                   | 3 minutes            |
| 5. | Matter is with the Task Force for motion and deliberation.                                                   |                      |
| 6. | Public comment (Excluding Complainant & City response, witnesses)                                            | Up to 3 minutes each |
| 7. | Vote by Task Force (Public comment at discretion of chair on new motion and/or on new motion if vote fails.) |                      |

Note: Time must be adhered to. If a speaker is interrupted by questions, the interruption does not count against his/her time.

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Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils, and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

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# SUNSHINE ORDINANCE TASK FORCE CITY AND COUNTY OF SAN FRANCISCO DRAFT MINUTES

Hearing Room 408  
City Hall, 1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

May 1, 2013 – 4:00 PM

## Regular Meeting

Members: Kitt Grant (Chair), Louise Fischer (Vice-Chair),  
Richard Knee, Suzanne Manneh, Allyson Washburn, David Pilpel,  
David Sims, Todd David, Chris Hyland, Bruce Oka

### 1. CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES

The meeting was called to order at 4:10 p.m. Members Washburn was noted absent. There was a quorum. Member Hyland left at 8:58; Chair Grant left at 9:01 p.m.

### 2. Supervisor of Records Report – Presented by Paula Jesson, Deputy City Attorney.

Paula Jesson, Deputy City Attorney presented the Supervisor of records report.

**Speakers:** Ray Hartz, Jr. expressed that he will submit a complaint against the Supervisor of Records; Peter Warfield recommended Task Force reject the Supervisor of Records Report.

**\*The following information is provided by a speaker, pursuant to Administrative Code Section 67.16. The content is neither generated by, nor subject to approval or verification of accuracy by, the Sunshine Ordinance Task Force.**

Ray Hartz, Jr. submitted the following additional information for Item (2) as follows:

*Agenda Item (2) public comment (150 words):*

•

I just handed to the administrator, a Sunshine Ordinance complaint against DCA Paula Jesson. The alleged violation reads as follows: "For all intents and purposes, DCA Jesson has acted in such a way as to provide legal counsel for City employees having custody of public records for the purposes of denying access to the public." This report from the Supervisor of Records follows the usual pattern: all petitions are denied! If you examine each case, you will see that Ms. Jesson will do nothing but tell you what her office will not, does not, or cannot do. I have to say that my own opinion is that Ms. Jesson is doing exactly what City Attorney Dennis Herrera wants: deny to the public access to records which might embarrass or incriminate City officials and commission members. To this extent, she does her job exceedingly well! I thank her for her report!

3. **Public Comment.**

**Speakers:** William Clark expressed the Charter does not give power to revoke a license with the Arts Commission; Mike Adderio expressed amending the Sunshine Ordinance to require members of Task Force to have training in relation to government and constitution laws; Ray Harz Jr. expressed Task Force hold-overs and vacancies are the failure of the Rules Committee and Clerk of the Board a complaint has been submitted against the Clerk of the Board; Maionchi expressed Public Records Act states you can see a document without going through custodian of records; Peter Warfield expressed he was in agreement with the previous speaker and stated similar experience with Library where he was referred to custodian of records.

4. **File No. 12058:** Complaint filed by Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

**Member Knee, seconded by Member Fischer, moved to find jurisdiction.**

**Speakers:** Ray Hartz expressed the meeting has been conducted out of order; Peter Warfield expressed public comment was called out of order.

**The motion PASSED by the following vote:**

Ayes: 8 – Knee, Pilpel, Sims, David, Hyland, Oka, Fischer, Grant

Absent: 1 – Washburn

Dominic Maionchi (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of Complainant. Olive Gong, Custodian of Records, Recreation and Park Department (Respondent), provided an overview of Recreation and Park Department's defense and requested the Task Force to dismiss the complaint. There were no speakers who offered facts and evidence in support of Respondent. A question and answer period followed. Complainant and Respondent responded to questions raised throughout the

*\*Complainant requested the complaints within Complaint No. 13007 to be heard separately.*

*Page 2*

discussion. Respondent provided a rebuttal. Complainant provided a rebuttal and again requested the Task Force find violations.

**Member Knee, seconded by Member Hyland, moved to find Recreation and Park Department in violation of Sunshine Ordinance Section 67.26 for illegal redaction of public records; referral to Compliance and Amendments Committee.**

**Speaker:** Ray Hartz expressed support with motion and reiterated that the requester is not required to state reason for a record request. Peter Warfield expressed Task Force should include the Deputy City Attorney's recommended violations as stated in the memo.

**The motion PASSED by the following vote:**

Ayes: 7 – Knee, Pilpel, Sims, Hyland, Oka, Fischer, Grant

Noes: 1 – David

Absent: 1 – Washburn

**Member Sims, seconded by Member Oka, moved to find Recreation and Park Department in violation of Sunshine Ordinance Section 67.24(e) for illegal redaction of contracts, bids and proposals.**

**Speaker:** Peter Warfield expressed support of the motion.

**The motion FAILED by the following vote:**

Ayes: 1 – Sims

Noes: 7 – Knee, Pilpel, David, Hyland, Oka, Fischer, Grant

Absent: 1 – Washburn

### **RECESS**

6:04 P.M. – 6:17 P.M.

5. **\*File No. 13007:** Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide an opportunity for the public to address Board at their January 7, 2013 meeting.

**Member Pilpel, seconded by Member Knee, moved to find jurisdiction.**

There were no speakers. **The motion PASSED without objection.**

Charles Pitts (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of Complainant. Diana Christensen, Director of Investigations, Human Services Agency (Respondent), provided an overview of Human Services Agency's defense and requested the Task Force to dismiss the complaint. There were no speakers who offered facts and evidence in support of Respondent. A question and answer period followed. Complainant and Respondent responded to questions raised throughout the discussion. Respondent waived rebuttal. Complainant provided a rebuttal and again requested the Task Force find violations.

Member Knee, seconded by Member Pilpel, moved to find Human Services Agency in violation of Sunshine Ordinance Section 67.21(e) for Respondent's failure to send a knowledgeable representative to hearing proceedings.

The motion PASSED by the following vote:

Ayes: 8 – Knee, Pilpel, Sims, David, Hyland, Oka, Fischer, Grant

Absent: 1 – Washburn

Member Sims, seconded by Member David, moved to find Human Services Agency in violation of Sunshine Ordinance Section 67.15(d) for abridging a member of the public and failure to provide necessary tools for public testimony; refer to Education, Outreach and Training.

Speakers: Peter Warfield expressed support of the motions.

The motion PASSED by the following vote:

Ayes: 6 – Pilpel, Sims, David, Hyland, Fischer, Grant

Noes: 2 – Knee, Oka

Absent: 1 – Washburn

6. File No. 13008: Complaint filed by William Clark against Tom DeCaigny, Director of Cultural Affairs for allegedly failing to include language in the Arts Commission's agenda to discuss and approve budgets for FY 2013-14 and FY 2014-15.

Member Knee, seconded by Member David, moved to find jurisdiction.

There were no speakers. The motion PASSED without objection.

William Clark (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of Complainant. Kate Patterson, Arts Commission (Respondent), provided an overview of Arts Commission's defense and requested the Task Force to dismiss the complaint. There were no speakers who offered facts and evidence in support of Respondent. A question and answer period followed. Complainant and Respondent responded to questions raised throughout the discussion. Respondent provided a rebuttal. Complainant provided a rebuttal and again requested the Task Force find violations.

Member Knee, seconded by Member Oka, moved to find Arts Commission in violation of Sunshine Ordinance 67.7(b) and Brown Act 54954.2(a)(2) for failure to include and adequate description of agenda items and street artist fees.

Speakers: Mike Addario expressed support of the motion.

The motion FAILED by the following vote:

Ayes: 4 – Knee, Sims, Hyland, Oka

Noes: 4 – Pilpel, David, Fischer, Grant

Absent: 1 – Washburn

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\*Complainant requested the complaints within Complaint No. 13007 to be heard separately.

7. \*File No. 13022: Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly walking out before public comment at their January 7, 2013 meeting.

**Member Knee, seconded by Member Fischer, moved to find jurisdiction.**

There were no speakers. **The motion PASSED without objection.**

Charles Pitts (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of Complainant. Diana Christensen, Director of Investigations, Human Services Agency (Respondent), provided an overview of Human Services Agency's defense and requested the Task Force to dismiss the complaint. There were no speakers who offered facts and evidence in support of Respondent. A question and answer period followed. Complainant and Respondent responded to questions raised throughout the discussion. Respondent waived rebuttal. Complainant provided a rebuttal and again requested the Task Force find violations.

**Member Knee, seconded by Member Sims, moved to find Human Services Agency in violation of Sunshine Ordinance Section 67.15(a) for failure in providing and opportunity for members of the public to address the Board; 67.21 for Respondent's failure to send a knowledgeable representative to hearing proceedings; referral to Education Outreach and Training.**

**Speakers: None.**

**The motion PASSED by the following vote:**

Ayes: 8 – Knee, Pilpel, Sims, David, Hyland, Oka, Fischer, Grant  
Absent: 1 – Washburn

8. \*File No. 13023: Complaint filed by Charles Pitts against the Local Homeless Coordination Board for allegedly failing to provide audio of their January 7, 2013 meeting.

**Member Pilpel, seconded by Member Fischer, moved to find jurisdiction.**

There were no speakers. **The motion PASSED without objection.**

Charles Pitts (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of Complainant. Diana Christensen, Director of Investigations, Human Services Agency (Respondent), provided an overview of Human Services Agency's defense and requested the Task Force to dismiss the complaint. There were no speakers who offered facts and evidence in support of Respondent. A question and answer period followed. Complainant and Respondent responded to questions raised throughout the discussion. Respondent waived rebuttal. Complainant provided a rebuttal and again requested the Task Force find violations.

Due to a lack of a motion, the Task Force **FOUND NO VIOLATION**.

Speakers: None.

Discussion regarding possible motion on state budget proposals regarding: 1) increasing court record access fees; and 2) halting State reimbursements that assist local governments in complying with the California Public Records Act.

Member Knee presented background on state budget proposal.

Member Knee, seconded by Member Sims, moved to **CONTINUE TO THE CALL OF THE CHAIR**.

There were no speakers. **The motion PASSED without objection.**

10. Discussion regarding proposed Resolution to Mayor Edwin Lee and the Board of Supervisors to: 1) communicate to the Governor and San Francisco's State Legislative representatives their opposition to State budget proposals that would grievously abridge the public's right to know by increasing court record access fees and halting state reimbursements that assist local governments in complying with the California Public Records Act; and 2) to instruct the City's legislative representative in the State Capitol to work diligently to persuade the Governor and the Legislature to delete/defeat said proposals.

Member Knee presented background and reasoning for proposal to Mayor and Board of Supervisors.

*Vice Chair Fischer presided over meeting in Chair Grants absence.*

Member Knee, seconded by Member Sims, moved to **CONTINUE TO THE CALL OF THE CHAIR**.

There were no speakers. **The motion PASSED without objection.**

11. Approval of Minutes from the November 7, 2012, Regular Meeting.

Member Pilpel, seconded by Member David, moved to approve the minutes as corrected.

Speaker: None.

**The motion PASSED without objection.**

12. Approval of Minutes from the December 5, 2012, Regular Meeting.

Member Pilpel, seconded by Member David, moved to approve the minutes as corrected.

Speaker: None.

The motion PASSED without objection.

13. Approval of Minutes from the December 12, 2012, Special Meeting.

Member Pilpel, seconded by Member David, moved to approve the minutes as corrected.

Speaker: None.

The motion PASSED without objection.

14. Approval of Minutes from the January 16, 2013 Special Meeting.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

15. Approval of Minutes from the February 6, 2013 Regular Meeting.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

16. Approval of Minutes from the March 6, 2013 Regular Meeting.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

17. Approval of Minutes from the April 3, 2013 Regular Meeting.

Member Fischer, seconded by Member David, moved CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

18. Report: Compliance and Amendments Committee meeting of April 16, 2013.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

19. Report: Education, Outreach and Training Committee meeting of April 29, 2013.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

20. Administrator's Report.

Member Fischer, seconded by Member David, moved to CONTINUE items 14 – 20 to June 5, 2013.

Speaker: None.

The motion PASSED without objection.

21. Announcements, Comments, Questions, and Future Agenda Items.

Information Technology meeting May 2, 2013, attendance is encouraged; topics of interest; back-up storage and retrieval of City records.

22. ADJOURNMENT

Member Knee, seconded by Member Oka, moved to ADJOURN.

There were no speakers. The motion PASSED without objection.

There being no further business, the Task Force adjourned at 9:12 p.m.

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Complainant presents his/her facts and evidence	5 minutes
Other parties of Complainant present facts and evidence	Up to 3 minutes each
City responds	5 minutes
Other parties of City respond	Up to 3 minutes each
<i>Above total speaking times for Complainant and City to be the same.</i>	
Matter is with the Task Force for discussion and questions.	
Respondent and Complainant presents clarification/rebuttal	3 minutes
Matter is with the Task Force for motion and deliberation.	
Public comment (Excluding Complainant & City response, witnesses)	Up to 3 minutes each
Vote by Task Force (Public comment at discretion of chair on new motion and/or on new motion if vote fails.)	

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**SUNSHINE ORDINANCE TASK FORCE**  
**Compliance and Amendments Committee**  
**CITY AND COUNTY OF SAN FRANCISCO**  
**DRAFT MINUTES**

Hearing Room 408  
City Hall, 1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

**July 16, 2013 – 4:00 P.M.**

**Regular Meeting**

**Members:** Allyson Washburn (Chair),  
Richard Knee, Kitt Grant

**1. CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES**

The meeting was called to order at 4:10 p.m. There was a quorum.

**2. Adoption of June 18, 2013, regular meeting minutes.**

Member Knee, seconded by Member Grant, moved to ADOPT the June 18, 2013 Minutes.

Speakers: Ray Hartz expressed concern with the vagueness of the minutes.

The motion PASSED by the following vote:

Ayes: 3 – Knee, Grant, Washburn

**3. File No. 12058: Hearing on the status of the Order of Determination of Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.**

Dominic Maionchi (Complainant) stated the Respondent provided the same documents provided in original records request, which do not comply with the Order of Determination. Complainant responded to questions raised throughout the discussion. There were no speakers in support of the Complainant. Olive Gong, Recreation and Park (Respondent) stated the California Government Code upholds the Recreation and Park's decision to redact documents provided to the Complainant and not disclose others. Respondent responded to questions raised throughout the discussion. There were no speakers in support of the Respondent. A question and answer period followed. Respondent declined rebuttal. Complainant provided a rebuttal.

Member Knee, seconded by Member Grant, moved to refer the matter back to the Task Force with a recommendation of referral to Ethics Commission for enforcement for violating S.O. Secs. 67.34, 67.26 and 67.21(i); for Chair to draft a letter to the City Attorney stating the Recreation and Park's attorney is in violation of S.O. Sec. 67.21 (i).

Speakers: Ray Hartz expressed support of the motion; Peter Warfield expressed Recreation and Park director should also be held responsible for department's failure to adhere to request.

**The motion PASSED by the following vote:**

Ayes: 3 – Knee, Grant, Washburn

4. **Public Comment.**

Ray Hartz expressed concern with decisions to have complaints referred to Education, Outreach and Training Committee (EOTC); doubts Chair ability to remain objective and has a history of concluding complaints.

5. **Administrator's Report.**

The Administrator presented the report.

Speakers: None.

6. **Announcements, Comments, Questions, and Future Agenda Items.**

Member Knee announced an event focused on upholding the people's right to know, to take place on July 17, 2013; Knee will not be in attendance for the September Task Force meeting.

7. **ADJOURNMENT**

Member Knee, seconded by Member Grant, moved to ADJOURN.

There were no speakers. **The motion PASSED without objection.**

There being no further business, the Compliance and Amendments Committee adjourned at the hour of 5:48 p.m.



# SUNSHINE ORDINANCE TASK FORCE CITY AND COUNTY OF SAN FRANCISCO DRAFT - MINUTES

Hearing Room 408  
City Hall, 1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

November 6, 2013 – 4:00 PM

## Regular Meeting

Members: Kitt Grant (Chair), Louise Fischer (Vice-Chair),  
Richard Knee, Allyson Washburn, David Pilpel,  
David Sims, Todd David, Chris Hyland, Bruce Oka

### CALL TO ORDER, ROLL CALL, AND AGENDA CHANGES

The meeting was called to order at 4:10 p.m. Member Pilpel David was noted absent. There was a quorum. Member David was noted present at 4:57 p.m.

Chair Grant announced a request for File No. 12059 (Item 5) be continued to December 4, 2013, by the Complainant and Respondent.

Member Pilpel, seconded by Member Oka, moved to accept the Complainants and Respondents' request for continuance of File No. 12059 to December 4, 2013.

Speakers: None.

The motion PASSED without objection.

2. **Proposed Sunshine Ordinance Task Force Records Retention Schedule:** The Task Force shall prepare, maintain and adopt a records retention and destruction policy as provided in §8.3 of the San Francisco Administrative Code.

Wilson Ng, Records Manager, Office of the Clerk of the Board presented the proposed retention schedule.

Member Pilpel, seconded by Member Hyland, moved to continue the item to December 4, 2013.

Speakers: Patrick Monette-Shaw questioned means of record content; Ray Hartz expressed the Index of Records is import tool in researching records; Peter Warfield

expressed concern with destruction of records and ADA compliancy of records; Jason Grant Garza expressed concern as to what defines a record.

**The motion PASSED by the following vote:**

Ayes: 8 – Knee, Washburn, Pilpel, Sims, Hyland, Oka, Fischer, Grant

Absent: 1 – David

**3. Pending Complaints and 45-Day Hearing Rule - Scheduling of Complaints.**

Chair Grant presented a comparison of agendized complaints; the efficiency of complaints heard and Order of Determination made by current Task Force. The Task Force would have to meet twice a month to reach compliancy with the 45-Day Hearing Rule.

The Administrator will work with Building Management to secure additional dates for special meetings.

**Speakers:** Patrick Monette-Shaw expressed agreement with the Task Force meeting an additional day a month; Ray Hartz expressed concern with the Task Force adhering with 45-day rule; Peter Warfield expressed concern with back-log of complaints and agreed with the Task Force meeting twice a month; Allen Grossman read a section of Ordinance regarding 3 minute public testimony rule; Jason Grant Garza expressed concern with a IDR he allegedly submitted and request for a hearing with before the Task Force.

**4. File No. 12058:** The Compliance and Amendments Committee has referred File No. 12058, Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

Dominic Maionchi (Complainant) provided an overview of the complaint. The Complainant further requested the Task Force to find violations. Patrick Monette-Shaw and Ray Hartz, Jr., spoke in support of the Complainant. Olive Gong (Respondent) provided an overview of Recreation and Park's defense; reiterating the department is not in violation according to their interpretation and the department policy to not disclose addresses. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

**Member Knee, seconded by Member Oka, moved to find the Recreation and Park Department in violation of the Sunshine Ordinance as determined in the Order of Determination (§§ 67.21(e), 67.24(g) and 67.34); referral to the Ethics Commission for enforcement specifically naming Phil Ginsburg, Director, Recreation and Park Department responsible.**

**Speakers:** Male Speaker expressed support for Complainant; Peter Warfield expressed support of Complainant.

The motion PASSED by the following vote:

Ayes: 8 – Knee, Washburn, Pilpel, Sims, Hyland, Oka, Fischer, Grant

Absent: 1 – David

RECESS 6:40 PM – 6:57 PM

5. File No. 12059: The Compliance and Amendments Committee has referred File No. 12059, Supreet Pabla, SEIU Local 1021 against Human Services Agency for allegedly failing to provide records requested relevant to the representation of the bargaining unit's employees.

*Continuance requested by Complainant and Respondent. Motion Passed (Item 1).*

Member Pilpel, seconded by Member Oka, moved to accept the Complainants and Respondents' request for continuance of File No. 12059 to December 4, 2013.

6. Public Comment.

Speakers: Ray Hartz expressed the 3 minute public testimony rule is not at the discretion of the body, but of the public; Patrick Monette-Shaw expressed utilizing the Superior Court when faced City actions against the public; Paula Datesh expressed concern with a permit revocation by the Arts Commission; James Chaffee presented a presentation regarding the Library Commission; Allen Grossman expressed concern with vacancies on the Task Force and pending referrals; Peter Warfield addressed the Superior Court ruling against the Ethic Commission; Jason Grant Garza expressed concern regarding an hearing request he allegedly submitted.

7. File No. 13025: Complaint filed by William Clark, against the Arts Commission for allegedly failing to provide of a written opinion from the City Attorney advising the Arts Commission on its current suspension and revocation procedures.

Member Knee, seconded by Member Pilpel, moved to find jurisdiction.

Speakers: None.

The motion PASSED without objection.

William Clark (Complainant) provided an overview of the complaint. The Complainant requested the Task Force to find violations. Robert Clark and Paula Datesh spoke in support of the Complainant. Howard Lazar (Respondent) provided an overview of the Arts Commission's defense. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent waived rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Pilpel, seconded by Member Washburn, moved to find the Arts Commission in violation of Sunshine Ordinance §67.21(a).

Speakers: Ray Hartz expressed concern of departments mischaracterizing the advice of their City Attorneys.

The motion **FAILED** by the following vote:

Ayes: 4 – Washburn, Pilpel, Hyland, Oka

Noes: 5 – Kneel, David, Sims, Fischer, Grant

**MATTER CONCLUDED.**

8. File No. 13026: Complaint filed by Ray Hartz, Jr., against Angela Calvillo, Clerk of the Board for allegedly violating Sunshine Ordinance §67.16 Minutes thereby censoring and abridging public comment violating §67.15 Public Testimony.

Member Fischer, seconded by Member Hyland, moved to find jurisdiction.

Speakers: None.

The motion **PASSED** without objection.

Ray Hartz, Jr., (Complainant) provided an overview of the complaint. The Complainant requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of the Complainant. Rick Caldeira, Deputy Director, Office of the Clerk of the Board (Respondent) provided an overview of the Clerk of the Board's defense; consideration is taken to not misrepresent speakers; speakers have the option to submit a 150-word summary. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent waived rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Speakers: Male Speaker expressed the minutes should summarize the speaker's comments for archival purposes; Peter Warfield expressed support of the complainant.

Due to a lack of a motion, the Task Force **FOUND NO VIOLATION.**

Member Kneel, seconded by Member Hyland, moved to find a violation of Sunshine Ordinance §67.16 for failing to provide a summary each speakers' statement with clarity and precision.

Speakers: Peter Warfield expressed the public has no power therefore minutes should be summarized; Male Speaker expressed he speaks on various issues during his public comment.

The motion **FAILED** by the following vote:

Ayes: 4 – Kneel, Washburn, Hyland, Oka

Noes: 5 – Pilpel, Kneel, Sims, David, Fischer, Grant

**MATTER CONCLUDED.**

9. File No. 13027: Complaint filed by Ray Hartz, Jr., against Paula Jesson, District City Attorney for allegedly violating §67.21(i), by providing legal counsel for City employees having custody of public records for proposes of denying access to the public.

Member Knee, seconded by Member Washburn, moved to find jurisdiction.

Speakers: Peter Warfield expressed support of finding jurisdiction.

The motion PASSED by the following vote:

Ayes: 8 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer, Grant

Noes: 1 – Pilpel

Ray Hartz, Jr., (Complainant) provided an overview of the complaint. The Complainant requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of the Complainant. Not Present (Respondent) to provide an overview of District Attorney's defense. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Complainant further requested the Task Force to find violations.

Member Knee, seconded by Member David, moved to find Paula Jesson, District City Attorney in violation of Sunshine Ordinance §67.21(d), for failure to immediately order the release of records requested; §67.21(e), for failure of a representative to appear before the Task Force; referral to the Compliance and Amendments Committee.

The motion PASSED by the following vote:

Ayes: 8 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer, Grant

Noes: 1 – Pilpel

10. File No. 13028: Complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly enforcing illegal group guidelines.

Member Knee, seconded by Member Hyland, moved to find jurisdiction.

Lisa Blakely, Director of Support Services challenged jurisdiction due to pending mediation with the Community Housing Partnership and Health Services Agency; Charles Pitts expressed the complaint is within the Task Force's jurisdiction.

Speakers: None.

The motion PASSED by the following vote:

Ayes: 9 – Knee, Washburn, Pilpel, Sims, David, Hyland, Oka, Fischer, Grant

Charles Pitts (Complainant) provided an overview of the complaint. The Complainant requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of the Complainant. Lisa Blakely, Director of Support Services

(Respondent) provided an overview of the Community Housing Partnership's defense. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent provided a rebuttal and requested the Task Force concluded the matter. The Complainant provided a rebuttal and further requested the Task Force to find violations.

**Due to a lack of a motion, the Task Force FOUND NO VIOLATION.**

**Speakers: None.**

#### **MATTER CONCLUDED**

11. **File No. 13029:** Complaint filed by Charles Pitts, against the Community Housing Partnership for allegedly denying the public to record the May 21, 2013 meeting.

**Member Knee, seconded by Member Hyland, moved to find jurisdiction.**

Lisa Blakely, Director of Support Services challenged jurisdiction due to the fact of tenant meetings not being equivalent to its Board meetings; Charles Pitts expressed the complaint is within the Task Force's jurisdiction.

**Speakers: None.**

**The motion PASSED without objection.**

Charles Pitts (Complainant) provided an overview of the complaint. The Complainant requested the Task Force to find violations. There were no speakers who offered facts and evidence in support of the Complainant. Lisa Blakely, Director of Support Services (Respondent) provided an overview of the Community Housing Partnership's defense. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent provided a rebuttal and requested the Task Force concluded the matter. The Complainant provided a rebuttal and further requested the Task Force to find violations.

**Due to a lack of a motion, the Task Force FOUND NO VIOLATION.**

**Speakers: None.**

#### **MATTER CONCLUDED**

12. **Approval of Minutes from the March 6, 2013 Regular Meeting.**

**Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.**

**Speaker: None.**

The motion PASSED without objection.

13. Approval of Minutes from the April 3, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

14. Approval of Minutes from the May 1, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

15. Approval of Minutes from the June 5, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

16. Approval of Minutes from the July 9, 2013 Special Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

17. Approval of Minutes from the August 7, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

18. Approval of Minutes from the September 4, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

19. Approval of Minutes from the October 2, 2013 Regular Meeting.

Member Knee, seconded by Member Pilpel, moved to CONTINUE Items 12 through 19, to the December 4, 2013 meeting.

Speaker: None.

The motion PASSED without objection.

20. Administrator's Report.

Report was given by Andrea Ausberry, Sunshine Ordinance Task Force Administrator.

21. Announcements, Comments, Questions, and Future Agenda Items

Andrea Ausberry, Sunshine Ordinance Task Force Administrator, announced her resignation as Task Force Administrator. Ms. Ausberry will transition into the legislative branch of the City and County of San Francisco; Member Pilpel announced the Ethics Commission will be amending its resolution and Education, Outreach and Training will be rescheduled.

22. ADJOURNMENT

Member Knee, seconded by Member Sims, moved to ADJOURN.

There were no speakers. The motion PASSED without objection.

There being no further business, the Task Force adjourned at the hour of 10:00 p.m.



**From:** Gong, Olive  
**Sent:** Monday, December 03, 2012 5:09 PM  
**To:** 'dominic maionchi'  
**Cc:** McArthur, Margaret  
**Subject:** Response to your request re 90 foot slip

Hello Dominic,

Hope you had a good weekend?

In response to your request dated 11-22-2012, please find attached the names and information for the people on the 90' Wait List. We do not actually have contracts as was requested.

Please note that we have redacted the personal contact information in these documents in order to protect the individuals' right to privacy under California Constitution, Article I, section 1, and California Government Code Sections 6254(c) and 6254(k). These provisions guard against disclosure of information that would invade personal privacy. Further, both the California Public Records Act (California Government Code Section 6250) and the San Francisco Sunshine Ordinance (San Francisco Administrative Code Section 67.1(g)) acknowledge the importance of protecting personal privacy where disclosing records in response to a public records request.

Best regards,  
Olive

Olive Gong  
San Francisco Recreation and Park Department | City & County of San Francisco  
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



Visit us at [sfrecpark.org](http://sfrecpark.org)  
Like us on [Facebook](#)  
Follow us on [Twitter](#)  
Watch us on [sfRecParkTV](#)  
Sign up for our [e-News](#)

*Reduce, Reuse, Recycle*

**From:** [dm567@pacbell.net](mailto:dm567@pacbell.net) [<mailto:dm567@pacbell.net>]

**Sent:** Thursday, November 22, 2012 5:18 PM

**To:** Moren, John

**Cc:** Doug

**Subject:** Re: 90 foot slip

John,

Are you never embarrassed?

I am requesting copies of the contracts for all people on the 90 foot wait list.

dom



Steven M. Lee, Mayor  
Philip A. Goldenberg, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

NANCY MUELLER

NANCY S. MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted] O.K.  
Office: 0

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: ☒

Signature of Applicant

LUCA BORICATTI  
FOR

NANCY S. MUELLER

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

\$75.00  
11/9/11



Edwin H. Lee, Mayor  
Philip A. Gindoff, General Manager

**SAN FRANCISCO MARINA**  
**WAIT LIST RENEWAL APPLICATION**  
**2011/2012 FISCAL YEAR**

November 2, 2011

Neil Pincus

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Other: 510-504-4055

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

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Renewal: ☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

\$75.00  
cc

11 NOV 22 AM 2:25

UNIVERSITY



Edwin H. Lee, Mayor  
Philip A. Glazer, General Manager

SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR

November 7, 2011

Peter Slobe

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Other:

916-275-2721

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

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Renewal: ☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

\$75.00  
12/15/11



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

3950 Scott Street, San Francisco, CA 94123

TEL: 415.831.6322 FAX: 415.293.7015 WEB: [www.sfmarina.org](http://www.sfmarina.org)

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE: 2-22-12

APPLICANT NAME (First): JASON (Last): HOLLOWAY

MAILING ADDRESS: [REDACTED] (APT NO.) [REDACTED]  
(CITY) [REDACTED] (STATE) CA (ZIP) [REDACTED]

TELEPHONE (HOME) [REDACTED] (WORK) ( ) [REDACTED]

CURRENT BOAT INFORMATION

POWER:      SAIL:      LOA (Tip-to-Tip)      DRAFT     

NO BOAT BUT PLAN TO GET: POWER:      SAIL: ✓

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application)

25'      30'      35'      40'      45'      50'      60'      80'      90' ✓

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to remain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ✓

Renewal:     

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please retain completed form to:

San Francisco Marina Wait List  
3950 Scott St.  
San Francisco, CA 94123

\$75.00  
02/27/12



Mayor Gavin Newsom  
General Manager Philip A. Ginsburg



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

3950 Scott Street, San Francisco, CA 94123

TEL 415 831 6322 FAX 415 292 2016 WEB [www.sfrparks.org](http://www.sfrparks.org)

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE 3/1/12

APPLICANT NAME (First): Paul (Last) Reyff

MAILING ADDRESS: [REDACTED] (APT NO.) [REDACTED]

(CITY) [REDACTED] (STATE) CA (ZIP) [REDACTED]

TELEPHONE: (HOME) [REDACTED] (WORK): (415) 860-8955

CURRENT BOAT INFORMATION

POWER ☒ SAIL ☐ LOA (Tip-to-Tip) 90' DRAFT 6.5'

NO BOAT BUT PLAN TO GET: POWER ☐ SAIL ☐

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' ☐ 30' ☐ 35' ☐ 40' ☐ 45' ☐ 50' ☐ 60' ☐ 80' ☐ 90' ☒

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application ☒

Renewal: ☐

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
3950 Scott St.  
San Francisco, CA 94123



Mayor Gavin Newsom  
General Manager Phillip A. Ginstburg

\$75.00  
OK 3/7/12

Gong, Olive

---

**From:** SOTF  
**Sent:** Thursday, September 26, 2013 3:06 PM  
**To:** Gong, Olive  
**Cc:** 'Kitt (sunshinechairgrant@gmail.com) Grant'; Threet, Jerry; Lee, Celia; Ginsburg, Phil; Ballard, Sarah; 'dm567@pacbell.net'  
**Subject:** FW: Response to COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park  
**Attachments:** Maionchi vs RPD Case 12058 response for Aug 7, 2013 Hearing and Sept 4, 2013.pdf; Attachment- Letter to SOTF dated Dec 19, 2012 - Response to Complaint 12058 - Dominic Maionchi v Rec and Park Dept.pdf

Ms. Gong,

The SOTF is in receipt of the attached documents which are the same documents/response submitted previously.

As a reminder the SOTF requested the presence of Mr. Ginsburg and Ms. Ballard to attend the October 2, 2013 hearing.

Best regards,

*Andrea Ausberry*

Sunshine Ordinance Task Force

---

**From:** Gong, Olive  
**Sent:** Wednesday, September 25, 2013 3:40 PM  
**To:** SOTF  
**Subject:** Response to COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park

Good Afternoon Andrea,

I have attached RPD's response for the October 2, 2013 hearing. The response is the same as what had previously been sent for the last hearing, Sept 4, 2013 and the hearing before that, August 7, 2013.

Thank you for your help,  
Olive

Olive Gong

San Francisco Recreation and Park Department | City & County of San Francisco  
McLaren Lodge In Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



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Watch us on [sfRecParkTV](http://sfrecparktv.org)

Sign up for our [e-News](http://sfrecpark.org/e-news)

#### *Reduce, Reuse, Recycle*

**From:** SOTF

**Sent:** Monday, September 23, 2013 4:22 PM

**To:** 'dm567@pacbell.net'; Gong, Olive; Ginsburg, Phil; Ballard, Sarah; [supreet.pabla@selu1021.org](mailto:supreet.pabla@selu1021.org); Christensen, Diana; Cantara, Gary; Nguyen, Francis; Chu, Carmen; 'mlke@gtsf.org'; 'Ray Hartz Jr'; Herrera, Luis; Blackman, Sue; 'Pmonette-shaw@earthlink.net'; [missforties@hotmail.com](mailto:missforties@hotmail.com); Morewitz, Mark; [supermica@gmail.com](mailto:supermica@gmail.com); Fu, Ben; Lewis, Don (CPC); Hwang, Lulu

**Cc:** 'Kitt (sunshinechairgrant@gmail.com) Grant'; Lee, Celia; Threet, Jerry

**Subject:** SOTF - NOTICE OF HEARING: Task Force Meeting October 2, 2013

Good Afternoon,

You are receiving this notice, because you are named as a Complainant or Respondent in one of the following complaints scheduled with the Sunshine Ordinance Task Force, 1) to hear the merits of the complaint 2) issue a determination and/or 3) complaint has been referred from a Task Force Committee.

1. COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park
2. COMPLAINT No. 12059, Supreet Pabla, SEIU Local 1022 v Human Services Agency
3. COMPLAINT No. 13012, Fondanova, representing Glad Tidings Church v the Office of the Assessor-Recorder
4. COMPLAINT No. 13013, Ray Hartz, Jr. v Luis Herrera, City Librarian
5. COMPLAINT No. 13021, Patrick Monette-Shaw/ Dr. Maria Rivero v the Public Health Commission
6. COMPLAINT No. 13024, Mica Ringel v the Planning Department

**Date:** October 2, 2013

**Location:** City Hall, Room 408

**Time:** 4:00 p.m.

**Complainants:** Your attendance is required for this meeting/hearing.

**Respondents/Departments:** Pursuant to Section 67.21 (e) of the Ordinance, the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.

**Documentation (evidence supporting/disputing complaint)**

For a document to be considered, it must be received at least five (5) working days before the hearing (see attached Public Complaint Procedure).

For inclusion of the agenda packet, supplemental/supporting documents must be received by 12:00 pm, **September**

27, 2013.

Kind regards,

Andrea S. Ausberry

Administrator

Sunshine Ordinance Task Force

Office 415.554.7724 | Fax 415.554.5163

[sotf@sfgov.org](mailto:sotf@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)

City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244

San Francisco, CA 94102

Follow Us! | [Twitter](#)

Complete a Board of Supervisors Customer Service Satisfaction form by clicking [HERE](#).



Gong, Olive

---

From: SOTF  
Sent: Thursday, October 24, 2013 4:57 PM  
To: 'dm567@pacbell.net'; Gong, Olive; Ginsburg, Phil; Ballard, Sarah; supreet.pabla@seiu1021.org; Christensen, Diana; Cantara, Gary; 'billandbobclark@access4less.net'; Lazar, Howard; Patterson, Kate; Ray Hartz Jr; Calvillo, Angela; Caldeira, Rick; Nevin, Peggy; Song, Jack; Jesson, Paula; 'Elizabeth Hewson' kitt grant; Lee, Celia; Threest, Jerry  
Cc:  
Subject: SOTF - NOTICE OF HEARING: Task Force Meeting November 6, 2013  
Attachments: 1\_Complaint Procedures\_4-28-09\_Final.pdf

Good Afternoon,

You are receiving this notice, because you are named as a Complainant or Respondent in one of the following complaints scheduled with the Sunshine Ordinance Task Force, 1) to hear the merits of the complaint 2) issue a determination and/or 3) complaint has been referred from a Task Force Committee.

1. COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park
2. COMPLAINT No. 12059, Supreet Pabla, SEIU Local 1022 v Human Services Agency
3. COMPLAINT No. 13025, William Clark v Arts Commission
4. COMPLAINT No. 13026, Ray Hartz, Jr. v Angela Calvillo, Clerk of the Board
5. COMPLAINT No. 13027, Ray Hartz, Jr. v Paula Jesson, Office of the City Attorney
6. COMPLAINT No. 13028, Charles Pitts v Community Housing Partnership
7. COMPLAINT No. 13029, Charles Pitts v Community Housing Partnership

Date: November 6, 2013

Location: City Hall, Room 408

Time: 4:00 p.m.

Complainants: Your attendance is required for this meeting/hearing.

Respondents/Departments: Pursuant to Section 67.21 (e) of the Ordinance, the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.

#### Documentation (evidence supporting/disputing complaint)

For a document to be considered, it must be received at least **five (5) working** days before the hearing (see attached Public Complaint Procedure).

For inclusion of the agenda packet, supplemental/supporting documents must be received by **12:00 pm, October 31, 2013.**

Thank you,

Andrea S. Ausberry

Administrator

Sunshine Ordinance Task Force

Office 415.554.7724 | Fax 415.554.5163

[ausberry@sfgov.org](mailto:ausberry@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)

City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244

San Francisco, CA 94102

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# SUNSHINE ORDINANCE TASK FORCE CITY AND COUNTY OF SAN FRANCISCO DRAFT - MINUTES

Hearing Room 408  
City Hall, 1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

October 2, 2013 – 4:00 PM

## Regular Meeting

1. Call to Order, Roll Call, and Agenda Changes.

The meeting was called to order at 4:10 p.m. Chair Grant and Members Pilpel and Hyland were noted absent. There was a quorum. Member Hyland was noted present at 4:55 p.m. Member Sims was noted absent at 7:57 p.m.

Vice Chair Fischer presided over the meeting.

Vice Chair Fischer announced a request for File No. 12059 (Item 4) be continued to November 5, 2013, by the Complainant and Respondent.

The Complainant of File No. 12058 (Item 2) requested a continuance of his hearing due to the affect of member absences on the determination of the complaint.

**Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.**

**Speakers:** Allen Gross expressed opposition with the members' absences; Peter Warfield requested additional information on the reason for the continuance of complaint No. 12059; Patrick Monette-Shaw requested the members uphold absences as stated in Sunshine Ordinance Task Force bylaws; Dominic Maionchi expressed reasoning of his request for continuance of Complaint No. 12058; Ray Hartz expressed six members being present would not make a fair determination on today's complaints.

### **The motion PASSED by the following vote:**

Ayes: 5 – Washburn, Sims, David, Oka, Fischer

Noes: 1 – Knee

Absent: 3 – Pilpel, Hyland, Grant

2. File No. 12058: The Compliance and Amendments Committee has referred File No. 12058, Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

*Continuance requested by Complainant. Motion Passed (Item 1).*

Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.

### RECESS

4:50 p.m. - 5:00 p.m.

### 3. Public Comment:

Allen Grossman announced the Ethics Commission's new draft of regulations; Ray Hartz expressed concern with the Education, Outreach and Training Committee Chair not drafting a letter to the Clerk of the Board as determined by the committee; Peter Warfield expressed the importance of open government; Male Speaker presented misconduct of Library Commission; Patrick Monette-Shaw expressed the Ethics Commission attempt to exempt themselves from hearing complaints referred for enforcement; Female Speaker expressed the treatment of the public by City agencies who request public records.

**\*The following information is provided by a speaker, pursuant to Administrative Code Section 67.16. The content is neither generated by, nor subject to approval or verification of accuracy by, the Sunshine Ordinance Task Force.**

Derek Kerr, MD submitted the following additional information for Public Comment as follows:

*Agenda Item (3) Public Comment (150 words):*

Derek Kerr's 150 Word Summary for inclusion in body of SOTF – OCTOBER 2, 2013 Meeting Minutes

"Burying my Commendation under the misleading agenda item "LHH Update" follows a pattern of deception. For example, Laguna Honda CEO Mivic Hirose was required to read this Commendation before the hospital's 40-member Leadership Forum. Instead, she read it to 11 members of her Executive Committee. After we complained, Hirose complied. Also, DPH Director Barbara Garcia had to retract a DPH Press Release that had labeled us "detractors" who made "false statements" about misappropriated patient funds. The first retraction was unsigned. We complained. Garcia signed the second version, but it was a Memo - not a Press Release. We complained again, and she complied. Lucky for us, we could appeal these Settlement violations to the Court. Now, we appeal to you because the Sunshine Ordinance was violated. This habitual misconduct will persist unless you monitor the Health Department and Commission for compliance.

4. **File No. 12059:** The Compliance and Amendments Committee has referred File No. 12059, Supreet Pabla, SEIU Local 1021 against Human Services Agency for allegedly failing to provide records requested relevant to the representation of the bargaining unit's employees.

*Continuance requested by Complainant and Respondent. Motion Passed (Item 1).*

Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.

5. **File No. 13013:** The Compliance and Amendments Committee has referred File No. 13013, of Ray Hartz Jr., against Luis Herrera, City Librarian for allegedly abridging public comment by allowing selective accessibility of library audio visual equipment.

Ray Hartz Jr., (Complainant) provided an overview of the complaint; the Library Commission continues to deny access to its equipment to present documents and /or PowerPoint presentations during its meetings as it allows for guests of the commission. The Complainant further requested the Task Force to find violations. There were no speakers in support of the Complainant. Sue Blackman (Respondent), provided an overview of the Ethics Commission defense; the Library Commission is a policy body that has the right to not allow the public to use its audio visual equipment and the commission is in compliance with the Sunshine Ordinance. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent waived rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Washburn, seconded by Member David, moved to find Luis Herrera, City Librarian, in violation of the Sunshine Ordinance as determined in the Order of Determination; referral to the Ethics Commission for enforcement.

Speakers: Patrick Monette-Shaw expressed support of the referral; Male Speaker presented PowerPoint on visual impact of audio visual presentations when allowed access to equipment; Peter Warfield expressed support of the motion.

**The motion PASSED by the following vote:**

Ayes: 7 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer

Absent: 2 – Pilpel, Grant

Member Washburn, seconded by Member David, moved to find Luis Herrera, City Librarian in violation of the Sunshine Ordinance as determined in the Order of Determination; referral to the Board of Supervisors for enforcement.

**The motion PASSED by the following vote:**

Ayes: 6 – Knee, Washburn, Sims, Hyland, Oka, Fischer

Noes: 1 – David

Absent: 2 – Pilpel, Grant

6. File No. 13012: Complaint filed by Michael Fondanova, representing Glad Tidings Church against the Office of the Assessor-Recorder for allegedly failing to provide complete records associated with Glad Tidings Church and San Francisco Teen Challenge.

*Item continued from September 4, 2013 meeting. Jurisdiction determined.*

Michael Fondanova (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers in support of the Complainant. Margaret Sing, Assessor - Recorder's Office, (Respondent), provided an overview of the Office of the Assessor-Recorder's defense; all non-exempt documents have been handed over to the Complainant. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

**Due to a lack of a motion, the Task Force FOUND NO VIOLATION.**

7. File No. 13021: Complaint filed by Patrick Monette-Shaw and Maria Rivero, MD against the Public Health Commission for allegedly violating Sunshine Ordinance §§ 67.7(a), 67.7(b), and 67.9(a); failing to notice members of the public, and noticing a deficient agenda.

**Member Knee, seconded by Member David, moved to find jurisdiction.**

**Speakers:** None.

**The motion PASSED by the following vote:**

Ayes: 7 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer

Absent: 2 – Pilpel, Grant

Patrick-Monette-Shaw and Maria River, MD (Complainants) provided an overview of the complaint; the intension of the Public Health Commission was to not provide a meaningful description of the item as an accommodation regarding Dr. Kerr and listed the item generically "Laguna Honda Update". The Complainants requested the Task Force to find violations. Dr. Kerr presented facts and evidence in support of the Complainants. Mark Morewitz, Executive Secretary, Public Health Commission (Respondent), provided an overview of the Public Health Commission's defense; the item was written by the advice of their City Attorney. The Commission has since taken steps to ensure future items are written in compliance with the Sunshine Ordinance. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Speakers: None.

Member Washburn, seconded by Member Oka, moved to find the Public Health Commission in violation of §§ 67.7(a), 67.7(b) and 67.9(a); referral to the Compliance and Amendments Committee to provide guidance on constructing agendas.

The motion PASSED by the following vote:

Ayes: 7 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer

Absent: 2 – Pilpel, Grant

*RECESS*

6:55 p.m. – 7:00 p.m.

8. File No. 13024: Complaint filed by Mica Ringel against the Planning Department for allegedly failing to provide requested records associated with the proposed development of 480 Potrero Avenue.

Member Knee, seconded by Member Sims, moved to find jurisdiction.

Speakers: None.

The motion PASSED without objection.

Mica Ringel (Complainant) provided an overview of the complaint; requested to view complete case file, through research and requests the Complainant noticed missing files not included in the original request for records. The Complainant requested the Task Force to find violations. There were no speakers in support of the Complainant. Lulu Hwang, Custodian of Records, Planning Department (Respondent), provided an overview of the Planning Department's defense; missing documents were retrieved and handed over to the Complainant on a disk. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Knee, seconded by Member Washburn, moved to find the Planning Department, in violation of the Sunshine Ordinance §§67.26 and 67.27.

Speakers: None.

The motion FAILED by the following vote:

Ayes: 4 – Washburn, Hyland, Oka, Fischer

Noes: 2 – Knee, David

Absent: 3 – Pilpel, Sims, Grant

Member Knee, seconded by Member Washburn, moved to find the Planning Department, in violation of the Sunshine Ordinance §§67.21(a) and 67.29-7; referral to Compliance and Amendments Committee.

Speakers: None.

The motion PASSED by the following vote:

Ayes: 6 – Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

9. Approval of Minutes from the March 6, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

10. Approval of Minutes from the April 3, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

11. Approval of Minutes from the May 1, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

12. Approval of Minutes from the June 5, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

13. Approval of Minutes from the July 9, 2013 Special Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

14. Approval of Minutes from the August 7, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

15. Approval of Minutes from the September 4, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

16. **Report: Compliance and Amendments Committee meeting of September 17, 2013.**

Member Washburn (Chair) provided a summary of the Compliance and Amendments Committee meeting of September 17, 2013.

Speakers: None.

17. **Report: Education, Outreach and Training Committee meeting of September 16, 2013.**

Member David (Vice-Chair) provided a summary of the Education, Outreach and Training Committee meeting of September 17, 2013.

18. **Administrator's Report.**

Report was given by Andrea Ausberry, Sunshine Ordinance Task Force Administrator.

19. **Announcements, Comments, Questions, and Future Agenda Items.**

Member Knee announced, applications have been submitted for Seats 2 and 4 of the Task Force.

20. **ADJOURNMENT**

Member Knee, seconded by Member David, moved to ADJOURN.

There were no speakers. **The motion PASSED without objection.**

There being no further business, the Task Force adjourned at the hour of 8:31 p.m.

File No. 12058

SOTF Item No. 4

CAC Item No. \_\_\_\_\_

**SUNSHINE ORDINANCE TASK FORCE**  
AGENDA PACKET CONTENTS LIST

Sunshine Ordinance Task Force (SOTF)

Date: May 1, 2013

Compliance and Amendments Committee (CAC)

Date: \_\_\_\_\_

**CAC/SOTF**

<input type="checkbox"/>	<input checked="" type="checkbox"/>	Memorandum
<input type="checkbox"/>	<input type="checkbox"/>	Order of Determination
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Complaint and Supporting documents
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Respondent's Response
<input type="checkbox"/>	<input type="checkbox"/>	Minutes
<input type="checkbox"/>	<input type="checkbox"/>	
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<input type="checkbox"/>	<input type="checkbox"/>	_____

Completed by: Andrea Ausberry Date April 24, 2013

Completed by: \_\_\_\_\_ Date \_\_\_\_\_

\*An asterisked item represents the cover sheet to a document that exceeds 75 pages.  
The complete document is in the file.

Gong, Olive

---

From: SOTF  
Sent: Thursday, September 26, 2013 3:06 PM  
To: Gong, Olive  
Cc: 'Kitt (sunshinechairgrant@gmail.com) Grant'; Threet, Jerry; Lee, Celia; Ginsburg, Phil; Ballard, Sarah; 'dm567@pacbell.net'  
Subject: FW: Response to COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park  
Attachments: Malonchi vs RPD Case 12058 response for Aug 7, 2013 Hearing and Sept 4, 2013.pdf; Attachment- Letter to SOTF dated Dec 19, 2012 - Response to Complaint 12058 - Dominic Maionchi v Rec and Park Dept.pdf

Ms. Gong,

The SOTF is in receipt of the attached documents which are the same documents/response submitted previously.

As a reminder the SOTF requested the presence of Mr. Ginsburg and Ms. Ballard to attend the October 2, 2013 hearing.

Best regards,

*Andrea Ausberry*

Sunshine Ordinance Task Force

---

From: Gong, Olive  
Sent: Wednesday, September 25, 2013 3:40 PM  
To: SOTF  
Subject: Response to COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park

Good Afternoon Andrea,

I have attached RPD's response for the October 2, 2013 hearing. The response is the same as what had previously been sent for the last hearing, Sept 4, 2013 and the hearing before that, August 7, 2013.

Thank you for your help,  
Olive

Olive Gong

San Francisco Recreation and Park Department | City & County of San Francisco  
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



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Watch us on [sfRecParkTV](#)

Sign up for our [e-News](#)

*Reduce, Reuse, Recycle*

**From:** SOTF

**Sent:** Monday, September 23, 2013 4:22 PM

**To:** 'dm567@pacbell.net'; Gong, Olive; Ginsburg, Phil; Ballard, Sarah; [supreet.pabla@seiu1021.org](mailto:supreet.pabla@seiu1021.org); Christensen, Diana; Cantara, Gary; Nguyen, Francis; Chu, Carmen; 'mlke@gtsf.org'; 'Ray Hartz Jr'; Herrera, Luis; Blackman, Sue; 'Pmonette-shaw@earthlink.net'; [missforties@hotmail.com](mailto:missforties@hotmail.com); Morewitz, Mark; [supermica@gmail.com](mailto:supermica@gmail.com); Fu, Ben; Lewis, Don (CPC); Hwang, Lulu

**Cc:** 'Klit ([sunshinechairgrant@gmail.com](mailto:sunshinechairgrant@gmail.com)) Grant'; Lee, Celia; Threet, Jerry

**Subject:** SOTF - NOTICE OF HEARING: Task Force Meeting October 2, 2013

Good Afternoon,

You are receiving this notice, because you are named as a Complainant or Respondent in one of the following complaints scheduled with the Sunshine Ordinance Task Force, 1) to hear the merits of the complaint 2) issue a determination and/or 3) complaint has been referred from a Task Force Committee.

1. COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park
2. COMPLAINT No. 12059, Supreet Pabla, SEIU Local 1022 v Human Services Agency
3. COMPLAINT No. 13012, Fondanova, representing Glad Tidings Church v the Office of the Assessor-Recorder
4. COMPLAINT No. 13013, Ray Hartz, Jr. v Luis Herrera, City Librarian
5. COMPLAINT No. 13021, Patrick Monette-Shaw/ Dr. Maria Rivero v the Public Health Commission
6. COMPLAINT No. 13024, Mica Ringel v the Planning Department

Date: October 2, 2013

Location: City Hall, Room 408

Time: 4:00 p.m.

Complainants: Your attendance is required for this meeting/hearing.

Respondents/Departments: Pursuant to Section 67.21 (e) of the Ordinance, the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.

**Documentation (evidence supporting/disputing complaint)**

For a document to be considered, it must be received at least five (5) working days before the hearing (see attached Public Complaint Procedure).

For inclusion of the agenda packet, supplemental/supporting documents must be received by 12:00 pm, September

27, 2013.

Kind regards,

Andrea S. Ausberry

Administrator

Sunshine Ordinance Task Force

Office 415.554.7724 | Fax 415.554.5163

[sotf@sfgov.org](mailto:sotf@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)

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San Francisco, CA 94102

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## Gong, Olive

---

From: SOTF  
Sent: Thursday, October 24, 2013 4:57 PM  
To: 'dm567@pacbell.net'; Gong, Olive; Ginsburg, Phil; Ballard, Sarah; supreet.pabla@seiu1021.org; Christensen, Diana; Cantara, Gary; 'billandbobclark@access4less.net'; Lazar, Howard; Patterson, Kate; Ray Hartz Jr; Calvillo, Angela; Caldeira, Rick; Nevin, Peggy; Song, Jack; Jesson, Paula; 'Elizabeth Hewson' kitt grant; Lee, Cella; Threet, Jerry  
Cc: SOTF - NOTICE OF HEARING: Task Force Meeting November 6, 2013  
Subject: SOTF - NOTICE OF HEARING: Task Force Meeting November 6, 2013  
Attachments: 1\_Complaint Procedures\_4-28-09\_Final.pdf

Good Afternoon,

You are receiving this notice, because you are named as a Complainant or Respondent in one of the following complaints scheduled with the Sunshine Ordinance Task Force, 1) to hear the merits of the complaint 2) issue a determination and/or 3) complaint has been referred from a Task Force Committee.

1. COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park
2. COMPLAINT No. 12059, Supreet Pabla, SEIU Local 1022 v Human Services Agency
3. COMPLAINT No. 13025, William Clark v Arts Commission
4. COMPLAINT No. 13026, Ray Hartz, Jr. v Angela Calvillo, Clerk of the Board
5. COMPLAINT No. 13027, Ray Hartz, Jr. v Paula Jesson, Office of the City Attorney
6. COMPLAINT No. 13028, Charles Pitts v Community Housing Partnership
7. COMPLAINT No. 13029, Charles Pitts v Community Housing Partnership

Date: November 6, 2013

Location: City Hall, Room 408

Time: 4:00 p.m.

Complainants: Your attendance is required for this meeting/hearing.

Respondents/Departments: Pursuant to Section 67.21 (e) of the Ordinance, the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.

### Documentation (evidence supporting/disputing complaint)

For a document to be considered, it must be received at least **five (5) working days** before the hearing (see attached Public Complaint Procedure).

For inclusion of the agenda packet, supplemental/supporting documents must be received by **12:00 pm, October 31, 2013.**

Thank you,

Andrea S. Ausberry

Administrator

Sunshine Ordinance Task Force

Office 415.554.7724 | Fax 415.554.5163

[sotf@sfgov.org](mailto:sotf@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)

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San Francisco, CA 94102

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# SUNSHINE ORDINANCE TASK FORCE CITY AND COUNTY OF SAN FRANCISCO DRAFT - MINUTES

Hearing Room 408  
City Hall, 1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

October 2, 2013 – 4:00 PM

## Regular Meeting

Call to Order, Roll Call, and Agenda Changes.

The meeting was called to order at 4:10 p.m. Chair Grant and Members Pilpel and Hyland were noted absent. There was a quorum. Member Hyland was noted present at 4:55 p.m. Member Sims was noted absent at 7:57 p.m.

Vice Chair Fischer presided over the meeting.

Vice Chair Fischer announced a request for File No. 12059 (Item 4) be continued to November 5, 2013, by the Complainant and Respondent.

The Complainant of File No. 12058 (Item 2) requested a continuance of his hearing due to the affect of member absences on the determination of the complaint.

**Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.**

**Speakers:** Allen Gross expressed opposition with the members' absences; Peter Warfield requested additional information on the reason for the continuance of complaint No. 12059; Patrick Monette-Shaw requested the members uphold absences as stated in Sunshine Ordinance Task Force bylaws; Dominic Maionchi expressed reasoning of his request for continuance of Complaint No. 12058; Ray Hartz expressed six members being present would not make a fair determination on today's complaints.

**The motion PASSED by the following vote:**

Ayes: 5 – Washburn, Sims, David, Oka, Fischer

Noes: 1 – Knee

Absent: 3 – Pilpel, Hyland, Grant

2. File No. 12058: The Compliance and Amendments Committee has referred File No. 12058, Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

*Continuance requested by Complainant. Motion Passed (Item 1).*

Member Knee, seconded by Member Washburn, moved to accept the Complainants and Respondents' request for continuance of File No. 12058 and File No. to November 6, 2013.

**RECESS**

*4:50 p.m. - 5:00 p.m.*

3. **Public Comment:**

Allen Grossman announced the Ethics Commission's new draft of regulations; Ray Hartz expressed concern with the Education, Outreach and Training Committee Chair not drafting a letter to the Clerk of the Board as determined by the committee; Peter Warfield expressed the importance of open government; Male Speaker presented misconduct of Library Commission; Patrick Monette-Shaw expressed the Ethics Commission attempt to exempt themselves from hearing complaints referred for enforcement; Female Speaker expressed the treatment of the public by City agencies who request public records.

**\*The following information is provided by a speaker, pursuant to Administrative Code Section 67.16. The content is neither generated by, nor subject to approval or verification of accuracy by, the Sunshine Ordinance Task Force.**

Derek Kerr, MD submitted the following additional information for Public Comment as follows:

*Agenda Item (3) Public Comment (150 words):*

Derek Kerr's 150 Word Summary for inclusion in body of SOTF – OCTOBER 2, 2013 Meeting Minutes

\*Burying my Commendation under the misleading agenda item "LHH Update" follows a pattern of deception. For example, Laguna Honda CEO Mivic Hirose was required to read this Commendation before the hospital's 40-member Leadership Forum. Instead, she read it to 11 members of her Executive Committee. After we complained, Hirose complied. Also, DPH Director Barbara Garcia had to retract a DPH Press Release that had labeled us "detractors" who made "false statements" about misappropriated patient funds. The first retraction was unsigned. We complained. Garcia signed the second version, but it was a Memo - not a Press Release. We complained again, and she complied. Lucky for us, we could appeal these Settlement violations to the Court. Now, we appeal to you because the Sunshine Ordinance was violated. This habitual misconduct will persist unless you monitor the Health Department and Commission for compliance.

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5. File No. 13013: The Compliance and Amendments Committee has referred File No. 13013, of Ray Hartz Jr., against Luis Herrera, City Librarian for allegedly abridging public comment by allowing selective accessibility of library audio visual equipment.

Ray Hartz Jr., (Complainant) provided an overview of the complaint; the Library Commission continues to deny access to its equipment to present documents and /or PowerPoint presentations during its meetings as it allows for guests of the commission. The Complainant further requested the Task Force to find violations. There were no speakers in support of the Complainant. Sue Blackman (Respondent), provided an overview of the Ethics Commission defense; the Library Commission is a policy body that has the right to not allow the public to use its audio visual equipment and the commission is in compliance with the Sunshine Ordinance. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Complainant responded to questions raised throughout the discussion and further requested the Task Force to find violations. The Respondent waived rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Washburn, seconded by Member David, moved to find Luis Herrera, City Librarian, in violation of the Sunshine Ordinance as determined in the Order of Determination; referral to the Ethics Commission for enforcement.

Speakers: Patrick Monette-Shaw expressed support of the referral; Male Speaker presented PowerPoint on visual impact of audio visual presentations when allowed access to equipment; Peter Warfield expressed support of the motion.

**The motion PASSED by the following vote:**

Ayes: 7– Knee, Washburn, Sims, David, Hyland, Oka, Fischer

Absent: 2 – Pilpel, Grant

Member Washburn, seconded by Member David, moved to find Luis Herrera, City Librarian in violation of the Sunshine Ordinance as determined in the Order of Determination; referral to the Board of Supervisors for enforcement.

**The motion PASSED by the following vote:**

Ayes: 6 – Knee, Washburn, Sims, Hyland, Oka, Fischer

Noes: 1 – David

Absent: 2 – Pilpel, Grant

6. File No. 13012: Complaint filed by Michael Fondanova, representing Glad Tidings Church against the Office of the Assessor-Recorder for allegedly failing to provide complete records associated with Glad Tidings Church and San Francisco Teen Challenge.

*Item continued from September 4, 2013 meeting. Jurisdiction determined.*

Michael Fondanova (Complainant) provided an overview of the complaint and requested the Task Force to find violations. There were no speakers in support of the Complainant. Margaret Sing, Assessor - Recorder's Office, (Respondent), provided an overview of the Office of the Assessor-Recorder's defense; all non-exempt documents have been handed over to the Complainant. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

**Due to a lack of a motion, the Task Force FOUND NO VIOLATION.**

7. File No. 13021: Complaint filed by Patrick Monette-Shaw and Maria Rivero, MD against the Public Health Commission for allegedly violating Sunshine Ordinance §§ 67.7(a), 67.7(b), and 67.9(a); failing to notice members of the public, and noticing a deficient agenda.

**Member Knee, seconded by Member David, moved to find jurisdiction.**

**Speakers:** None.

**The motion PASSED by the following vote:**

Ayes: 7 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer

Absent: 2 – Pilpel, Grant

Patrick-Monette-Shaw and Maria River, MD (Complainants) provided an overview of the complaint; the intention of the Public Health Commission was to not provide a meaningful description of the item as an accommodation regarding Dr. Kerr and listed the item generically "Laguna Honda Update". The Complainants requested the Task Force to find violations. Dr. Kerr presented facts and evidence in support of the Complainants. Mark Morewitz, Executive Secretary, Public Health Commission (Respondent), provided an overview of the Public Health Commission's defense; the item was written by the advice of their City Attorney. The Commission has since taken steps to ensure future items are written in compliance with the Sunshine Ordinance. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Speakers: None.

Member Washburn, seconded by Member Oka, moved to find the Public Health Commission in violation of §§ 67.7(a), 67.7(b) and 67.9(a); referral to the Compliance and Amendments Committee to provide guidance on constructing agendas.

The motion PASSED by the following vote:

Ayes: 7 – Knee, Washburn, Sims, David, Hyland, Oka, Fischer

Absent: 2 – Pilpel, Grant

*RECESS*

*6:55 p.m. – 7:00 p.m.*

8. File No. 13024: Complaint filed by Mica Ringel against the Planning Department for allegedly failing to provide requested records associated with the proposed development of 480 Potrero Avenue.

Member Knee, seconded by Member Sims, moved to find jurisdiction.

Speakers: None.

The motion PASSED without objection.

Mica Ringel (Complainant) provided an overview of the complaint; requested to view complete case file, through research and requests the Complainant noticed missing files not included in the original request for records. The Complainant requested the Task Force to find violations. There were no speakers in support of the Complainant. Lulu Hwang, Custodian of Records, Planning Department (Respondent), provided an overview of the Planning Department's defense; missing documents were retrieved and handed over to the Complainant on a disk. There were no speakers who offered facts and evidence in support of the Respondent. A question and answer period followed. The Respondent provided a rebuttal. The Complainant provided a rebuttal and further requested the Task Force to find violations.

Member Knee, seconded by Member Washburn, moved to find the Planning Department, in violation of the Sunshine Ordinance §§67.26 and 67.27.

Speakers: None.

The motion FAILED by the following vote:

Ayes: 4 – Washburn, Hyland, Oka, Fischer

Noes: 2 – Knee, David

Absent: 3 – Pilpel, Sims, Grant

Member Knee, seconded by Member Washburn, moved to find the Planning Department, in violation of the Sunshine Ordinance §§67.21(a) and 67.29-7; referral to Compliance and Amendments Committee.

Speakers: None.

The motion PASSED by the following vote:

Ayes: 6 – Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

9. Approval of Minutes from the March 6, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

10. Approval of Minutes from the April 3, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

11. Approval of Minutes from the May 1, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

12. Approval of Minutes from the June 5, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

13. Approval of Minutes from the July 9, 2013 Special Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

14. Approval of Minutes from the August 7, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

15. Approval of Minutes from the September 4, 2013 Regular Meeting.

Member Washburn, seconded by Member Hyland, moved to CONTINUE Items 9 through 15, to the November 6, 2013 meeting.

Speaker: None.

The motion PASSED by the following vote:

Ayes: 6– Knee, Washburn, David, Hyland, Oka, Fischer

Absent: 3 – Pilpel, Sims, Grant

16. **Report: Compliance and Amendments Committee meeting of September 17, 2013.**

Member Washburn (Chair) provided a summary of the Compliance and Amendments Committee meeting of September 17, 2013.

Speakers: None.

17. **Report: Education, Outreach and Training Committee meeting of September 16, 2013.**

Member David (Vice-Chair) provided a summary of the Education, Outreach and Training Committee meeting of September 17, 2013.

18. **Administrator's Report.**

Report was given by Andrea Ausberry, Sunshine Ordinance Task Force Administrator.

19. **Announcements, Comments, Questions, and Future Agenda Items.**

Member Knee announced, applications have been submitted for Seats 2 and 4 of the Task Force.

20. **ADJOURNMENT**

Member Knee, seconded by Member David, moved to ADJOURN.

There were no speakers. The motion PASSED without objection.

There being no further business, the Task Force adjourned at the hour of 8:31 p.m.



DENNIS J. HERRERA  
City Attorney

JERRY THREET  
Deputy City Attorney

Direct Dial: (415) 554-3914  
Email: jerry.threet@sfgov.org

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
FROM: Jerry Threet  
Deputy City Attorney  
DATE: April 26, 2013  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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### BACKGROUND

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2013 records request, and that they also failed to provide unredacted copies of the records requested.

### COMPLAINT

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21(b), 67.24(e)(1), and 67.24(i) of the Ordinance.

### JURISDICTION

The Recreation and Parks Department is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint against the Department.

### APPLICABLE STATUTORY SECTION(S):

Section 67 of the San Francisco Administrative Code:

- Section 67.21 governs responses to a public records request.
- Section 67.24 governs public information that must be disclosed under the Ordinance, notwithstanding exceptions under the Public Records Act.

Section 6250 et seq. of the Cal. Gov't Code

- Section 6253 governs the release of public records and the timing of responses.

### APPLICABLE CASE LAW:

None.

### ISSUES TO BE DETERMINED

Uncontested/Contested Facts: Complainant alleges as follows:

November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
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RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24i I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.

In a letter dated December 19, 2011, Olive Gong responded on behalf of the Department to complaint. Gong first alleges that the records request was received by email after 5 p.m. on Thursday, November 22, 2012, which was a holiday and thus the Department was not open for business. Ms Gong thus alleges that the Department actually received the request on Monday, November 26, 2012. She thus concludes that the Department's email response on December 2, 2012, 7 days later, was within the 10 day response time required by the Ordinance. Ms. Gong further alleges that the response included electronic copies of the five application forms for 90 foot berths that were responsive and in the Department's custody.

Ms. Gong further alleges that the Department redacted personal address and telephone information from the forms provided, but did not redact the names of the individuals or any business contact information that they may have provided. She further alleges that the redaction was done to protect the individual right of privacy of these applicants. Ms. Gong does not provide a copy of the email transmittal of these redacted documents, so it is unclear whether that email response explained the redaction or provided any justification for it to Complainant.

Ms. Gong further alleges that, upon receipt of the email and redacted documents, Complainant objected to the redactions the Department had performed on the documents. She further states that on December 11, 2012, the Department sent a writing to Complainant "explaining again why [the Department] was redacting home address and phone numbers from the application forms and providing legal citations for those redactions."

Ms. Gong's response to the Complaint then contains an extensive legal analysis of why the Department was justified in redacting the private contact information from the berth applications, which I will not repeat here.

**QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:**

- What exactly was the Department's written response on December 2, 2012?
- Did the Department's December 2, 2012 response include a written justification for the redaction of the documents provided and cite to the exemptions on which it relied for such redaction?

**LEGAL ISSUES/LEGAL DETERMINATIONS:**

- Did the Department timely respond to the records request under Section 67.21(b)?
- Were the records at issue covered by Section 67.24(e)(1) of the Ordinance?
- Did the Department respond in the manner required by Section 67.24 or the Ordinance?

MEMORANDUM

TO: Sunshine Ordinance Task Force  
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CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE TRUE OR NOT TRUE.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 4  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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**SEC. 67.1 FINDINGS AND PURPOSE .**

The Board of Supervisors and the People of the City and County of San Francisco find and declare:

- (a) Government's duty is to serve the public, reaching its decisions in full view of the public.
- (b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.
- (c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.
- (d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.
- (e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force, can protect the public's interest in open government.
- (f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.
- (g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process.

**SEC. 67.21. PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS;  
ADMINISTRATIVE APPEALS.**

- (a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.
- (b) A *custodian of a public record* shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
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RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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(k) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance.

**SEC. 67.24. PUBLIC INFORMATION THAT MUST BE DISCLOSED.**

Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

(e) Contracts, Bids and Proposals

(1) Contracts, contractors' bids, responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(i) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance.

**CALIFORNIA PUBLIC RECORDS ACT****6254. EXEMPTION OF PARTICULAR RECORDS**

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

[...]

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

[...]

(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 6  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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**CALIFORNIA CONSTITUTION, ART. I, § 3 (PROPOSITION 59) A. ARTICLE 1**

SEC. 3. (a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

(Added Nov. 5, 1974. Amended by Stats. 2004, Res. c. 1 (S.C.A.1) (Prop. 59, approved Nov. 2, 2004, eff. Nov. 3, 2004).)

Ausberry, Andrea

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From: complaints@sfgov.org  
Sent: Wednesday, December 12, 2012 2:57 PM  
To: SOTF  
Subject: Sunshine Complaint

To: sotf@sfgov.org  
Email: complaints@sfgov.org  
DEPARTMENT: san francisco park and recreation  
CONTACTED: Olive Gong  
PUBLIC\_RECORDS\_VIOLATION: Yes  
PUBLIC\_MEETING\_VIOLATION: No  
MEETING\_DATE:  
SECTIONS\_VIOLATED: 67.21b 67.24e1 67.24i

DESCRIPTION: On November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24i I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.

HEARING: Yes  
PRE-HEARING: Yes  
DATE: 12/12/12  
NAME: dominic maionchi  
ADDRESS: 250 avila street  
CITY: san francisco ca  
ZIP: 94123  
PHONE: 4153858278  
CONTACT\_EMAIL: dm567@pacbell.net  
ANONYMOUS:  
CONFIDENTIALITY\_REQUESTED: No

SOTF

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From: dm567@pacbell.net  
Sent: Saturday, January 26, 2013 8:40 AM  
To: SOTF  
Cc: Gong, Olive  
Subject: Fwd: Mediation Response Received -SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept  
Attachments: Response to Complaint 12058 - Dominic Maionchi v Rec and Park Dept.pdf; Exhibit A.pdf

Dear Andrea,

I have not heard back. I informed you that the documents did not complete my request. See below. Have you scheduled a hearing date yet?

Thank you,

dom

dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

Begin forwarded message:

From: "dm567@pacbell.net" <dm567@pacbell.net>  
Subject: Re: Mediation Response Received -SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept  
Date: December 21, 2012 10:35:30 AM PST  
To: SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)>

Dear Honorable Members, Sunshine Ordinance Task Force,

The provided documents do not complete my request. Please schedule a hearing date.

The documents provided do not  
dominic maionchi  
dmp567@pacbell.net

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

On Dec 20, 2012, at 6:38 PM, SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)> wrote:

Good Afternoon,

The SOTF Office is in receipt of a response from the Recreation and Park Department ,regarding your above mentioned complaint case.

The Respondent was notified of your complaint, in an attempt to mediate and stave off a hearing before the Sunshine Ordinance Task Force. The following email and attached documents are the Respondent's response/records you requested.

The SOTF Office will consider your case to be resolved. Unless you respond to whether the documents the Respondent has provided completes your request.

Thank you,

Andrea S. Ausberry  
Administrator  
Sunshine Ordinance Task Force  
Office 415.554-7724 | Fax 415.554-5163

[sotf@sfgov.org](mailto:sotf@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)

City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244

San Francisco, CA 94102

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**From:** Gong, Olive

**Sent:** Wednesday, December 19, 2012 3:18 PM

**To:** SOTF

**Cc:** Ausberry, Andrea; McArthur, Margaret

**Subject:** Response to SOTF Complaint 12058 - Dominic Malonchi v Rec and Park Dept

Dear SOTF,

Please see attached response to Complaint # 12058 - Dominic Malonchi v Rec and Park Dept.

Olive Gong

San Francisco Recreation and Park Department | City & County of San Francisco

McLaren Lodge In Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



Visit us at [sfrecpark.org](http://sfrecpark.org)

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Sign up for our [e-News](#)

*Reduce, Reuse, Recycle*



Edwin M. Lee, Mayor  
Philip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force

From: Olive Gong, Custodian of Records, Recreation and Park Department

Date: December 19, 2012

Subject: Dominic Maionchi v. Recreation and Park Department  
Complaint # 12058

We write in response to the complaint Dominic Maionchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Maionchi alleges that RPD violated (1) "Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e1," and (3) "Section 67.24i." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Maionchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article I, Section 1 of the California Constitution.

I. RPD Complied With Maionchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(f); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Maionchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Maionchi asked for "copies of the contracts for all people on the 90 foot wait list."<sup>1</sup>

RPD responded to Malonchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Malonchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Malonchi.

The Wait List applications Malonchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Malonchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Malonchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Malonchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

## II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

### 1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Maionchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Maionchi in response to his public records request.

## **2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.**

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1019 (1999); see also *Lorig v. Med. Bd.*, 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); *Sheet Metal Workers v. Dep't of Veteran Affairs*, 135 F.3d 891, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits, that would follow disclosure." *Id.* at 488. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id.* at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See *Sheet Metal Workers Int'l*, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Dep't of Defense*, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD – as required by RPD – they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

## **3. There Is no Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information is Unrelated to RPD's Performance of Its Duties.**

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. *Braun v.*

City of Taft, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light' on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); *Painting Industry of Hawaii v. Dept. of Air Force* (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "what the government is up to"); Local 1274, Ill. Fed. of Teachers v. Niles (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); *Voinche v. F.B.I.* (D.D.C. 1996) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., *Sonoma County Employees' Ret. Ass'n v. Superior Court*, 198 Cal. App. 4th 986, 1006 (2011) (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 339 (2007) (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest – which, so far as we can tell, is nil – served by Malonchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in *City of San Jose*, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." *Id.* at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also *Painting Indus. of Hawaii*, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); Local 1274, Ill. Fed. of Teachers, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); *Sheet Metal Workers*, 135 F.3d at 903 ("The release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Maionchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Maionchi.

(ii). RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Maionchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

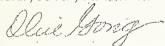
As an initial matter, the Wait List application forms that RPD provided Maionchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form -- the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[i]f the name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

A handwritten signature in cursive script, appearing to read "Olive Gong".

Olive Gong  
Custodian of Records

Attachments: Exhibit A





Erin M. Lee, Mayor  
Philp A. Glasberg, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

NANCY MUELLER

NANCY S. MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Other:

Birth Date: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy-Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy-Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: ☒ X

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

LUCA BERTUCCI  
FOR

NANCY S. MUELLER

\$75.00  
11/9/11



Edwin H. Lee, Mayor  
Philip A. Ginsburg, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

Neil Pinous

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [REDACTED]  
Office: 510-504-4055

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: ☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

*\$75.00*  
*ce*

11 NOV 22 AM 2:25



Edward M. Lee, Mayor  
Philip A. Ghelberg, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

Peter Stabe

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Other:

916-275-2721

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to remain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: ☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94113

\$75.00  
12/5/11



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

3950 Scott Street, San Francisco, CA 94123

TEL: 415.031.6723 FAX: 415.293.7015 WEB: www.sfmarrs.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE: 2-22-12

APPLICANT NAME (FIRST): Jason (LAST): Holloway

MAILING ADDRESS: [REDACTED] (APT NO.): [REDACTED]

(CITY): [REDACTED] (STATE): CA (ZIP): [REDACTED]

TELEPHONE: (HOME): [REDACTED] (WORK): ( ) [REDACTED]

CURRENT BOAT INFORMATION:

POWER: [REDACTED] SAIL: [REDACTED] LOA (Tip-to-Tip): [REDACTED] DRAFT: [REDACTED]

NO BOAT BUT PLAN TO GET: POWER: [REDACTED] SAIL: ✓

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' [ ] 30' [ ] 35' [ ] 40' [ ] 45' [ ] 50' [ ] 60' [ ] 80' [ ] 90' ✓

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ✓

Renewal: [ ]

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
3950 Scott St.  
San Francisco, CA 94123

\$75.00  
OK 2/15  
02/27/12



Mayer Green Howard  
General Manager Philip A. Chisberg



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

3950 Scott Street, San Francisco, CA 94123

TEL 415.821.8322 FAX 415.242.2016 WEB: www.sfrp.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First): PAUL (Last): REYFF

MAILING ADDRESS: [REDACTED] (APT NO.) [REDACTED]

(CITY) [REDACTED] (STATE) CA (ZIP) [REDACTED]

TELEPHONE: (HOME) [REDACTED] (WORK): (415) 860-8955

CURRENT BOAT INFORMATION:

POWER: ☒ SAIL: ☐ LOA (Tip-to-Tip) 90' DRAFT 6.5'

NO BOAT BUT PLAN TO GET: POWER: ☐ SAIL: ☐

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' ☐ 30' ☐ 35' ☐ 40' ☐ 45' ☐ 50' ☐ 60' ☐ 80' ☐ 90' ☒

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ☒

Renewal: ☐

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
3950 Scott St.  
San Francisco, CA 94123



Mayor Gavin Newsom  
General Manager Phillip A. Glasburg

\$75.00  
OK 3/7/12

TO: Sunshine Task Force

FROM: Dominic Maionchi

RE: Complaint number 12058

4/24/2013

Dear Sunshine Ordinance Task Force Members,

On November 22nd, 2012 I requested copies of the un-redacted wait list contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out a form that requires a yearly fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available.

On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAJONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information and I was provided un-redacted berthing agreements complete with mailing addresses.

On December 11th, 2012 after 19 days, I received notice that they would not be providing the un-redacted documents.

San Francisco Park and Recreation has again violated section 67.21, specifically:

1. Section 67.21b by not complying in 10 days with the request, and
2. Section 67.24e1
3. Section 67.24i

I ask that the un-redacted wait list agreements be provided complete with mailing addresses.

RPD claims that these wait list agreements are not contracts. RPD defines a contract as an "agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." RPD claims that these agreements do not create an enforceable right. On the contrary, these wait list agreements do clearly provide an enforceable obligation on the part of RPD. Namely, they are to provide a slip when one

becomes available. If RPD did not provide a slip when available, the wait list applicant could enforce the agreement against RPD. Furthermore, there is consideration for this agreement in the form of a fee that has been approved by the controller's office. Simply pretending that this is not a contract does not make it something else.

RPD continues to argue that even if it is a contract that there is nothing in the sunshine ordinance that compels the city to disclose private residences that may be listed in the contract. RPD is again mistaken. First, the ordinance clearly states that contracts "shall be open for inspection immediately." The ordinance does not differentiate between contracts between businesses or individuals. Furthermore, a careful reading of the ordinance tells one that one should err on the side of disclosing information rather than not disclosing information. According to section 67.27 withholding is to be kept to a minimum. Furthermore, there is no exempt information on the wait list agreement under the California Public Records Act.

The un-redacted berthing agreements between the RPD and individuals were deemed by the Sunshine Task Force to be available under the Sunshine Ordinance to me on July 28, 2009. (Case 09032) The wait list agreements are no different and should also be made available to me un-redacted also. I would like the addresses so that I can inform the wait list applicants by mail to their contact address of transactions entered into by RPD that may have violated their right to a slip. In my opinion, that is why we have a Sunshine Ordinance in the first place; we need to keep everyone honest.

Regards,



Edwin H. Lee, Mayor  
Philip A. Greenfield, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

NANCY MUELLER

NANCY S. MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Office:

0

Birth Size:

99

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, contact contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes in my contact information or my good standing on the Waiting List may be cancelled.

Renewal:

X

Signature of Applicant

San Francisco Marina

Please make checks payable to:

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3856 Scott Street  
San Francisco, CA 94123



Edwin M. Lee, Mayor  
Paula A. Gussing, General Manager

**SAN FRANCISCO MARINA**  
**WAIT LIST RENEWAL APPLICATION**  
**2011/2012 FISCAL YEAR**

November 3, 2011

Neil Phokus

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Other:

510-504-4033

Boat Size:

90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewed:

X

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3930 Scott Street  
San Francisco, CA 94123

11 NOV 22 AM 2:25



Edwin H. Lee, Mayor  
Philip A. Stuchlik, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

Peter Stobe

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Office:

916-275-2721

Birth Date: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth on the San Francisco Marina Sausal Creek Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to remain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: ☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94122

12/15/11  
12/15/11  
12/15/11



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

1950 Scott Street, San Francisco, CA 94123

TEL: 415.831.6322 FAX: 415.299.2015 WEB: [www.sfdmr.org](http://www.sfdmr.org)

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE 2-22-12

APPLICANT NAME (First): Jason (Last): Holloway

MAILING ADDRESS: [REDACTED] (APT NO.) [REDACTED]

(CITY): [REDACTED] (STATE): CA (ZIP): [REDACTED]

TELEPHONE (HOME): [REDACTED] (WORK): [REDACTED]

CURRENT BOAT INFORMATION

POWER: \_\_\_\_\_ SAIL: \_\_\_\_\_ LOA (Tip-to-Tip): \_\_\_\_\_ DRAFT: \_\_\_\_\_

NO BOAT BUT PLAN TO GET: POWER: \_\_\_\_\_ SAIL: X

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' \_\_\_\_\_ 30' \_\_\_\_\_ 35' \_\_\_\_\_ 40' \_\_\_\_\_ 45' \_\_\_\_\_ 50' \_\_\_\_\_ 60' \_\_\_\_\_ 80' \_\_\_\_\_ 90' ✓

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to return my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ✓

Renewal: \_\_\_\_\_

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
1950 Scott St.  
San Francisco, CA 94123



Mayor Gavin Newsom  
Councilmember Philip A. Ginzburg

175.00  
#175.00  
04/27/12



City and County of San Francisco  
Recreation and Park Department

San Francisco Marina

1950 Scott Street, San Francisco, CA 94123

TEL: 415-871-6322 FAX: 415-255-3045 [www.sfdem.org](http://www.sfdem.org)

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First) PAUL (Last) REYFF

MAILING ADDRESS [REDACTED] (APT. NO.) [REDACTED]

(CITY) [REDACTED] (STATE) CA (ZIP) [REDACTED]

TELEPHONE (HOME) [REDACTED] (WORK) (415) 360-3935

CURRENT BOAT INFORMATION:

POWER ☒ SAIL        LOA (Tip-to-Tip) 90' DRAFT 6.5'

NO. BOAT BUT PLAN TO GET: POWER        SAIL       

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25'        30'        35'        40'        45'        50'        60'        80'        90' ☒

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to remain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ☒

Renewal:       

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed forms to:

San Francisco Marina Wait List  
1950 Scott St.  
San Francisco, CA 94123



Mayor Gavin Newsom  
General Manager Phillip A. Christburg

\$75.00  
OK  
3/7/12



Edwin M. Lee, Mayor  
Philip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force

From: Olive Gong, Custodian of Records, Recreation and Park Department

Date: December 19, 2012

Subject: Dominic Malonchi v. Recreation and Park Department  
Complaint # 12058

We write in response to the complaint Dominic Malonchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Malonchi alleges that RPD violated (1) "Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e 1," and (3) "Section 67.24i." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Malonchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article 1, Section 1 of the California Constitution.

I. RPD Complied With Malonchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(f); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Malonchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Malonchi asked for "copies of the contracts for all people on the 90 foot wait list." 1

RPD responded to Maionchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Maionchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Maionchi.

The Wait List applications Maionchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Maionchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Maionchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Maionchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." 3.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right; it belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Malonchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Malonchi in response to his public records request.

## **2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.**

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1019 (1999); see also *Loig v. Med. Bd.*, 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); *Sheet Metal Workers v. Dep't of Veteran Affairs*, 135 F.3d 891, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits, that would follow disclosure." *Id.* at 488. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id.* at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See *Sheet Metal Workers Int'l*, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Dep't of Defense*, 510 U.S. at 580. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD - as required by RPD - they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

## **3. There is no Justification for Violating the Right to Privacy by Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information is Unrelated to RPD's Performance of Its Duties.**

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. *Braun v.*

*City of Taft*, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" *City of San Jose*, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., *Dep't of Defense*, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); *Painting Industry of Hawaii v. Dept. of Air Force* (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "what the government is up to"); *Local 1274, Ill. Fed. of Teachers v. Niles* (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); *Voinche v. F.B.I.*, (D.D.C. 1996) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., *Sanoma County Employees' Ret. Ass'n v. Superior Court*, 198 Cal. App. 4th 986, 1006 [2011] (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); *Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 339 [2007] (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest – which, so far as we can tell, is nil – served by Majonchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in *City of San Jose*, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." *Id.* at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best," *Dep't of Defense*, 510 U.S. at 497; see also *Painting Indus. of Hawaii*, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); *Local 1274, Ill. Fed. of Teachers*, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); *Sheet Metal Workers*, 135 F.3d at 903 ("The release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Maionchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Maionchi.

### III. RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Maionchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

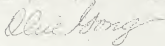
As an initial matter, the Wait List application forms that RPD provided Maionchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form – the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[t]he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

A handwritten signature in dark ink, appearing to read "Olive Gong". The signature is fluid and cursive, with a horizontal line extending from the end.

Olive Gong  
Custodian of Records

Attachments: Exhibit A

File No. 12058

SOTF Item No. \_\_\_\_\_

CAC Item No. 3

**SUNSHINE ORDINANCE TASK FORCE**  
AGENDA PACKET CONTENTS LIST

Sunshine Ordinance Task Force (SOTF)

Date: \_\_\_\_\_

Compliance and Amendments Committee (CAC)

Date: July 16, 2013

**CAC/SOTF**

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Completed by: Andrea Ausberry Date July 10, 2013

Completed by: \_\_\_\_\_ Date \_\_\_\_\_

\*An asterisked item represents the cover sheet to a document that exceeds 75 pages.  
The complete document is in the file.



## ORDER OF DETERMINATION

June 12, 2013

### DATE THE DECISION ISSUED

May 1, 2013

*DOMINIC MAIONCHI V. RECREATION AND PARKS DEPARTMENT (CASE NO. 12058)*

### FACTS OF THE CASE

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2012 records request, and that they also failed to provide unredacted copies of the records requested.

### COMPLAINT FILED

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21(b), 67.24(e)(1), and 67.24(i) of the Ordinance.

### HEARING ON THE COMPLAINT

On May 1, 2013, Complainant, Dominic Maionchi appeared before the Task Force and presented his claim. Respondent, Olive Gong, Custodian of Records, Recreation and Park Department presented Recreation and Park Department's defense.

The issue in the case is whether Recreation and Park Department violated Sections 67.21 and 67.24 of the Ordinance and/or Sections 6253 of the California Public Records Act.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and evidence presented the Task Force finds that the testimony of Complainant, Dominic Maionchi to be persuasive and finds that Section 67.26 of the Sunshine Ordinance to be applicable in this case. The Task Force does not find the testimony provided by Respondent, Olive Gong persuasive with regard to alleged violation of Section 67.26.

### DECISION AND ORDER OF DETERMINATION

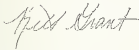
The Task Force finds that Recreation and Park Department violated Section 67.26 of the Sunshine Ordinance for illegal redaction of personal information contained in public records. The agency shall release the unredacted records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on July 16, 2013.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on May 1, 2013, by the following vote: (Knee / Hyland)

Ayes: Knee, Pilpel, Sims, Hyland, Oka, Fischer, Grant

Noes: David

Absent: Washburn



Kitt Grant, Chair  
Sunshine Ordinance Task Force

- c: Jerry Threet, Deputy City Attorney  
Dominic Maionchi, Complaint  
Olive Gong, Recreation and Park Department, Respondent



DENNIS J. HERRERA  
City Attorney

JERRY THREET  
Deputy City Attorney

Direct Dial: (415) 554-3914  
Email: jerry.threet@sfgov.org

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
FROM: Jerry Threet  
Deputy City Attorney  
DATE: April 26, 2013  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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### BACKGROUND

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2013 records request, and that they also failed to provide unredacted copies of the records requested.

### COMPLAINT

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21(b), 67.24(e)(1), and 67.24(i) of the Ordinance.

### JURISDICTION

The Recreation and Parks Department is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint against the Department.

### APPLICABLE STATUTORY SECTION(S):

#### Section 67 of the San Francisco Administrative Code:

- Section 67.21 governs responses to a public records request.
- Section 67.24 governs public information that must be disclosed under the Ordinance, notwithstanding exceptions under the Public Records Act.

#### Section 6250 et seq. of the Cal. Gov't Code

- Section 6253 governs the release of public records and the timing of responses.

### APPLICABLE CASE LAW:

None.

### ISSUES TO BE DETERMINED

Uncontested/Contested Facts: Complainant alleges as follows:

November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 2  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24i I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.

In a letter dated December 19, 2011, Olive Gong responded on behalf of the Department to complaint. Gong first alleges that the records request was received by email after 5 p.m. on Thursday, November 22, 2012, which was a holiday and thus the Department was not open for business. Ms Gong thus alleges that the Department actually received the request on Monday, November 26, 2012. She thus concludes that the Department's email response on December 2, 2012, 7 days later, was within the 10 day response time required by the Ordinance. Ms. Gong further alleges that the response included electronic copies of the five application forms for 90 foot berths that were responsive and in the Department's custody.

Ms. Gong further alleges that the Department redacted personal address and telephone information from the forms provided, but did not redact the names of the individuals or any business contact information that they may have provided. She further alleges that the redaction was done to protect the individual right of privacy of these applicants. Ms. Gong does not provide a copy of the email transmittal of these redacted documents, so it is unclear whether that email response explained the redaction or provided any justification for it to Complainant.

Ms. Gong further alleges that, upon receipt of the email and redacted documents, Complainant objected to the redactions the Department had performed on the documents. She further states that on December 11, 2012, the Department sent a writing to Complainant "explaining again why [the Department] was redacting home address and phone numbers from the application forms and providing legal citations for those redactions."

Ms. Gong's response to the Complaint then contains an extensive legal analysis of why the Department was justified in redacting the private contact information from the berth applications, which I will not repeat here.

**QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:**

- What exactly was the Department's written response on December 2, 2012?
- Did the Department's December 2, 2012 response include a written justification for the redaction of the documents provided and cite to the exemptions on which it relied for such redaction?

**LEGAL ISSUES/LEGAL DETERMINATIONS:**

- Did the Department timely respond to the records request under Section 67.21(b)?
- Were the records at issue covered by Section 67.24(e)(1) of the Ordinance?
- Did the Department respond in the manner required by Section 67.24 or the Ordinance?

**MEMORANDUM**

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 3  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

---

**CONCLUSION**

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE TRUE OR NOT TRUE.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 4  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

---

**SEC. 67.1 FINDINGS AND PURPOSE .**

The Board of Supervisors and the People of the City and County of San Francisco find and declare:

- (a) Government's duty is to serve the public, reaching its decisions in full view of the public.
- (b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.
- (c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.
- (d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.
- (e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force, can protect the public's interest in open government.
- (f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.
- (g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process.

**SEC. 67.21. PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS;  
ADMINISTRATIVE APPEALS.**

- (a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.
- (b) A custodian of a public record shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
 DATE: April 26, 2013  
 PAGE: 5  
 RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

---

(k) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance.

**SEC. 67.24. PUBLIC INFORMATION THAT MUST BE DISCLOSED.**

Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

**(e) Contracts, Bids and Proposals**

(1) Contracts, contractors' bids, responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(i) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance.

**CALIFORNIA PUBLIC RECORDS ACT****6254. EXEMPTION OF PARTICULAR RECORDS**

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

[...]

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

[...]

(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 6  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

---

**CALIFORNIA CONSTITUTION, ART. I, § 3 (PROPOSITION 59) A. ARTICLE 1**

SEC. 3. (a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

(Added Nov. 5, 1974. Amended by Stats. 2004, Res. c. 1 (S.C.A.1) (Prop. 59, approved Nov. 2, 2004, eff. Nov. 3, 2004).)

Ausberry, Andrea

---

From: Gong, Olive  
Sent: Thursday, June 13, 2013 2:49 PM  
To: Threet, Jerry  
Cc: dm567@pacbell.net; SOTF; kitt grant  
Subject: RE: Response to Order of Determination - 12058

Hi Mr. Threet,

Yes, your statement in the below email is correct.

Olive Gong

San Francisco Recreation and Park Department | City & County of San Francisco  
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



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---

**From:** Jerry.Threet@sfgov.org [mailto:Jerry.Threet@sfgov.org]  
**Sent:** Thursday, June 13, 2013 2:46 PM  
**To:** Gong, Olive  
**Cc:** dm567@pacbell.net; SOTF; kitt grant  
**Subject:** RE: Response to Order of Determination - 12058

Ms. Gong -

In other words, the department will not comply with the OD, and relies on the reasoning in its original response to the complaint.

Is that correct?

---

Jerry Threet, Deputy City Attorney  
Neighborhood and Resident Safety Division  
Counsel to Sunshine Task Force  
Office of City Attorney Dennis J. Herrera  
1390 Market Street, 6th Floor  
San Francisco, CA 94102  
Direct: (415) 554-3914  
Fax: (415) 437-4644  
[jerry.threet@sfgov.org](mailto:jerry.threet@sfgov.org)

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From: "Gong, Olive" <[olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)>  
To: "Threet, Jerry" <[jerry.threet@sfgov.org](mailto:jerry.threet@sfgov.org)>,  
Cc: "dm567@pacbell.net" <[dm567@pacbell.net](mailto:dm567@pacbell.net)>, SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)>, kitt grant <[sunshinechairgrant@gmail.com](mailto:sunshinechairgrant@gmail.com)>  
Date: 06/13/2013 02:39 PM  
Subject: RE: Response to Order of Determination - 12058

Hi Mr. Threet,

Yes, I am confirming that we have just re-sent the same letter. The Department has not changed its stance in regards to the complaint.

Sincerely,  
Olive Gong

Olive Gong  
San Francisco Recreation and Park Department | City & County of San Francisco  
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117  
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From: [jerry.threet@sfgov.org](mailto:jerry.threet@sfgov.org) [<mailto:jerry.threet@sfgov.org>]  
Sent: Thursday, June 13, 2013 2:33 PM  
To: Gong, Olive  
Cc: [dm567@pacbell.net](mailto:dm567@pacbell.net); SOTF; kitt grant  
Subject: Re: Response to Order of Determination - 12058

Ms. Gong -

I am confused by the Department's response to the OD. You have simply sent the response previously provided by the department to the complaint.

Can you please clarify the intent of this response?

Jerry Threet, Deputy City Attorney

Neighborhood and Resident Safety Division  
Counsel to Sunshine Task Force  
Office of City Attorney Dennis J. Herrera  
1350 Market Street, 6th Floor  
San Francisco, CA 94102  
Direct: (415) 554-3914  
Fax: (415) 437-4644  
[jeremy.threet@sfgov.org](mailto:jeremy.threet@sfgov.org)

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From: "Gong, Olive" <[olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)>  
To: SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)>;  
Cc: "Threet, Jerry" <[jeremy.threet@sfgov.org](mailto:jeremy.threet@sfgov.org)>; kitt grant <[sunshinechairgrant@gmail.com](mailto:sunshinechairgrant@gmail.com)>; "dm567@pacbell.net" <[dm567@pacbell.net](mailto:dm567@pacbell.net)>  
Date: 06/13/2013 01:44 PM  
Subject: Response to Order of Determination - 12058

Dear SOTF,  
Please find attached the department's response to the Order of Determination.  
Best regards,  
Olive Gong

Olive Gong  
Custodian of records  
San Francisco Recreation and Park Department | City & County of San Francisco  
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117  
(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



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From: SOTF  
Sent: Wednesday, June 12, 2013 4:09 PM  
To: Gong, Olive; [dm567@pacbell.net](mailto:dm567@pacbell.net)  
Cc: Threet, Jerry; kitt grant  
Subject: SOTF - Order of Determination - 12058

Good Afternoon,

Attached is the Order of Determination from the Sunshine Ordinance Task Force, regarding the above titled complaint.

Kind regards,

Andrea S. Ausberry  
Administrator  
Sunshine Ordinance Task Force  
Office 415.554.7724 | Fax 415.554.5163  
[sotf@sfgov.org](mailto:sotf@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)  
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244  
San Francisco, CA 94102  
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Complete a Board of Supervisors Customer Service Satisfaction form by clicking [here](#)  
[attachment "Exhibit A.pdf" deleted by Jerry Threet/CTYATT] [attachment "Response to Complaint 12058 - Dominic Maionchi v Rec and Park Dept.pdf" deleted by Jerry Threet/CTYATT]

Ausberry, Andrea

---

From: dm567@pacbell.net  
Sent: Tuesday, June 04, 2013 4:07 PM  
To: Gong, Olive  
Cc: SOTF  
Subject: Re: Response to your sunshine request

Dear Olive,

Are the powers that be aware that the Sunshine Task Force Ruled that the documents should not be redacted in their ruling?

Is your department refusing to abide by their ruling?

Regards,

Dominic maionchi  
dm567@pacbell.net

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

On Jun 4, 2013, at 4:01 PM, "Gong, Olive" <[olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)> wrote:

Hi Dominic,

We have received the documents requested in your request dated 5-31-2013, received Monday, 6-3-2013 (and copied below) and will send them to you as soon as they have been reviewed and by the deadline of 6-13-2013, though I expect to have them ready by tomorrow.

In your new request, dated 6-4-2013, you asked to see original documents, however, as mentioned previously, we do not release waiting information without redacting personal information first.

Let me know if you have any further questions,  
Olive

Olive Gong

San Francisco Recreation and Park Department | City & County of San Francisco  
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



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**From:** [dm567@pacbell.net](mailto:dm567@pacbell.net) [mailto:[dm567@pacbell.net](mailto:dm567@pacbell.net)]

**Sent:** Friday, May 31, 2013 8:41 PM

**To:** Gong, Olive

**Subject:** Re: sunshine request

Dear Olive,

This email is meant for you.

This is a NEW Sunshine request in addition to my sunshine request on May 29th.

Please send me the wait list applications (contracts) for the 90 foot wait list as they are in the records as of today. There may have been changes to them since the last time I received them? Please don't tell me that there have been no changes. I would like to see copies of them as they sit in the files today.

Dom

dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

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Ausberry, Andrea

---

From: dm567@pacbell.net  
Sent: Tuesday, June 04, 2013 8:26 AM  
To: SOTF  
Subject: Re: Sunshine Complaint Received: Case No. 12058 Dominic Maionchi v Recreation and Park

Re: Sunshine Complaint Received: Case No. 12058 Dominic Maionchi v Recreation and Park

Andrea,

Act and Park is refusing to provide the documents. They tell me I already received them. How do I get this case assigned to a committee of the task force for enforcement follow up?

I am now officially filing a second complaint with the task force for the same documents. Put me on the docket.

Dom

dominic maionchi  
dm567@pacbell.net

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Olive Gong  
San Francisco Recreation and Park Department | City & County of San Francisco  
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**Sent:** Friday, May 31, 2013 8:41 PM

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**Subject:** Re: sunshine request

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Dom

dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

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From: "Gong, Olive" <[olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)>  
To: Threet, Jerry <[jerry.threet@sfgov.org](mailto:jerry.threet@sfgov.org)>  
Cc: [dm567@pacbell.net](mailto:dm567@pacbell.net) <[dm567@pacbell.net](mailto:dm567@pacbell.net)>, SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)>, Kitt Grant <[sunshinechairgrant@gmail.com](mailto:sunshinechairgrant@gmail.com)>  
Date: 2013 JUN 13 02:39 PM  
Subject: RE: Response to Order of Determination - 12058

Hi Mr. Threet,

Yes, I am confirming that we have just re-sent the same letter. The Department has not changed its stance in regards to the complaint.

Sincerely,  
Olive Gong

Olive Gong  
San Francisco Recreation and Park Department | City & County of San Francisco  
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From: [Jerry.Threet@sfgov.org](mailto:Jerry.Threet@sfgov.org) [[mailto:Jerry.Threet@sfgov.org](mailto:mailto:Jerry.Threet@sfgov.org)]  
Sent: Thursday, June 13, 2013 2:33 PM  
To: Gong, Olive  
Cc: [dm567@pacbell.net](mailto:dm567@pacbell.net); SOTF; Kitt Grant  
Subject: Re: Response to Order of Determination - 12058

Ms. Gong -

I am confused by the Department's response to the OD. You have simply sent the response previously provided by the department to the complaint.

Can you please clarify the intent of this response?

\_\_\_\_\_  
Jerry Threet, Deputy City Attorney

Neighborhood and Resident Safety Division  
Counsel to Sunshine Task Force  
Office of City Attorney Dennis J. Herrera  
1390 Market Street, 6th Floor  
San Francisco, CA 94102  
Direct: (415) 554-3914  
Fax: (415) 437-4844  
[jerry.threet@sfgov.org](mailto:jerry.threet@sfgov.org)

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From: "Gong, Olive" <[olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)>  
To: SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)>,  
Cc: "Threet, Jerry" <[jerry.threet@sfgov.org](mailto:jerry.threet@sfgov.org)>, kitt grant <[sunshinechairgrant@gmail.com](mailto:sunshinechairgrant@gmail.com)>, "dm567@pacbell.net" <[dm567@pacbell.net](mailto:dm567@pacbell.net)>  
Date: 06/13/2013 01:44 PM  
Subject: Response to Order of Determination - 12058

Dear SOTF,  
Please find attached the department's response to the Order of Determination.  
Best regards,  
Olive Gong

Olive Gong  
Custodian of records  
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**From:** SOTF  
**Sent:** Wednesday, June 12, 2013 4:09 PM  
**To:** Gong, Olive; [dm567@pacbell.net](mailto:dm567@pacbell.net)  
**Cc:** Threet, Jerry; kitt grant  
**Subject:** SOTF - Order of Determination - 12058

Good Afternoon,

Attached is the Order of Determination from the Sunshine Ordinance Task Force, regarding the above titled complaint.

Kind regards,

Andrea S. Ausberry  
Administrator  
Sunshine Ordinance Task Force  
Office 415.554.7724 | Fax 415.554.5163  
[gotf@sfgov.org](mailto:gotf@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)  
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[attachment "Exhibit A.pdf" deleted by Jerry Threet/CTYATT] [attachment "Response to Complaint 12058 - Dominic Maionchi v Rec and Park Dept.pdf" deleted by Jerry Threet/CTYATT]

Ausberry, Andrea

---

From: complaints@sfgov.org  
Sent: Wednesday, December 12, 2012 2:57 PM  
To: SOTF  
Subject: Sunshine Complaint

To:sotf@sfgov.org  
Email:complaints@sfgov.org  
DEPARTMENT:san francisco park and recreation  
CONTACTED:Olive Gong  
PUBLIC\_RECORDS\_VIOLATION:Yes  
PUBLIC\_MEETING\_VIOLATION:No  
MEETING\_DATE:  
SECTIONS\_VIOLATED:67.21b 67.24e1 67.24i

DESCRIPTION:On November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24i I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.

HEARING:Yes  
PRE-HEARING:Yes  
DATE:12/12/12  
NAME:dominic maionchi  
ADDRESS:250 avila street  
CITY:san francisco ca  
ZIP:94123  
PHONE:4153858278  
CONTACT\_EMAIL:dm567@pacbell.net  
ANONYMOUS:  
CONFIDENTIALITY\_REQUESTED:No

## SOTF

---

From: dm567@pacbell.net  
Sent: Saturday, January 26, 2013 8:40 AM  
To: SOTF  
Cc: Gong, Olive  
Subject: Fwd: Mediation Response Received -SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept  
Attachments: Response to Complaint 12058 - Dominic Maionchi v Rec and Park Dept.pdf, Exhibit A.pdf

Dear Andrea,

I have not heard back. I informed you that the documents did not complete my request. See below. Have you scheduled a hearing date yet?

Thank you,

dom

dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

Begin forwarded message:

From: "[dm567@pacbell.net](mailto:dm567@pacbell.net)" <[dm567@pacbell.net](mailto:dm567@pacbell.net)>  
Subject: Re: Mediation Response Received -SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept  
Date: December 21, 2012 10:35:30 AM PST  
To: SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)>

Dear Honorable Members, Sunshine Ordinance Task Force,

The provided documents do not complete my request. Please schedule a hearing date.

The documents provided do not  
dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

On Dec 20, 2012, at 6:38 PM, SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)> wrote:

Good Afternoon,

The SOTF Office is in receipt of a response from the Recreation and Park Department ,regarding your above mentioned complaint case.

The Respondent was notified of your complaint, in an attempt to mediate and stave off a hearing before the Sunshine Ordinance Task Force. The following email and attached documents are the Respondent's response/records you requested.

The SOTF Office will consider your case to be resolved. Unless you respond to whether the documents the Respondent has provided completes your request.

Thank you,

Andrea S. Ausberry  
Administrator  
Sunshine Ordinance Task Force  
Office 415.554.7724 | Fax 415.554.5163

[sfrecgong@sfrecpark.org](mailto:sfrecgong@sfrecpark.org) | [www.sfbos.org](http://www.sfbos.org)

City Hall, 100 Carlton B. Goodlett Place, Rm. 244

San Francisco, CA 94102

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Complete a Board of Supervisors Customer Service Satisfaction form by clicking [here](#)

From: Gong, Olive

Sent: Wednesday, December 19, 2012 3:18 PM

To: SOTF

Cc: Ausberry, Andrea; McArthur, Margaret

Subject: Response to SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept

Dear SOTF,

Please see attached response to Complaint # 12058 - Dominic Maionchi v Rec and Park Dept.

Olive Gong

San Francisco Recreation and Park Department | City & County of San Francisco

McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



Visit us at [sfrecpark.org](http://sfrecpark.org)

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Follow us on [Twitter](#)

Watch us on [sfRecParkTV](#)

Sign up for our [e-News](#)

Reduce, Reuse, Recycle



Edwin M. Lee, Mayor  
Philip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force  
From: Olive Gong, Custodian of Records, Recreation and Park Department  
Date: December 19, 2012  
Subject: Dominic Malonchi v. Recreation and Park Department  
Complaint # 12038

We write in response to the complaint Dominic Malonchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Malonchi alleges that RPD violated (1) "Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e1," and (3) "Section 67.24i." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Malonchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article I, Section 1 of the California Constitution.

I. RPD Complied With Malonchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(f); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Malonchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Malonchi asked for "copies of the contracts for all people on the 90 foot wait list."<sup>1</sup>

RPD responded to Maionchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Maionchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Maionchi.

The Wait List applications Maionchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Maionchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Maionchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Maionchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

**II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.**

**1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.**

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Maionchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Maionchi in response to his public records request.

## **2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.**

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1019 (1999); see also *Lorig v. Med. Bd.*, 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); *Sheet Metal Workers v. Dep't of Veteran Affairs*, 135 F.3d 891, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits, that would follow disclosure." *Id.* at 488. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id.* at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See *Sheet Metal Workers Int'l*, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Dep't of Defense*, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD – as required by RPD – they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

## **3. There Is No Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information Is Unrelated to RPD's Performance of Its Duties.**

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. *Braun v.*

City of San Jose, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); *Painting Industry of Hawaii v. Dept. of Air Force* (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "what the government is up to"); *Local 1274, Ill. Fed. of Teachers v. Nilles* (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); *Voineche v. F.B.I.* (D.D.C. 1996) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., *Sonoma County Employees' Ret. Ass'n v. Superior Court*, 198 Cal. App. 4th 986, 1006 (2011) (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); *Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 339 (2007) (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest – which, so far as we can tell, is nil – served by Maiorchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in *City of San Jose*, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." *Id.* at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also *Painting Indus. of Hawaii*, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); *Local 1274, Ill. Fed. of Teachers*, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); *Sheet Metal Workers*, 135 F.3d at 903 ("The release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Maionchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Maionchi.

### III. RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Maionchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

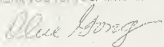
As an initial matter, the Wait List application forms that RPD provided Maionchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form – the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[i]f the name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

A handwritten signature in cursive script, reading "Olive Gong".

Olive Gong  
Custodian of Records

Attachments: Exhibit A





Edwin M. Lee, Mayor  
Philip A. Gladwin, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

NANCY MUGLER

NANCY S. MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Name:

 O.K.

Other:

0

Berth Size:

90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy-Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

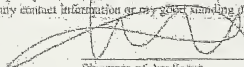
I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy-Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal:

X

Signature of Applicant

 ELICA BARRICATTI  
FOR NANCY S. MUELLER

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3050 Scott Street  
San Francisco, CA 94133

\$75.00  
check #443  
11/9/11



Edwin H. Lee, Mayor  
Philip A. Ginsburg, General Manager

**SAN FRANCISCO MARINA**  
**WAIT LIST RENEWAL APPLICATION**  
**2011/2012 FISCAL YEAR**

November 2, 2011

NOH Pincus



We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:



Other:

510-504-4055

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 ending June 30<sup>th</sup> 2012.

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: ☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

\$75.00  
ce

11 NOV 22 AM 2:25



Edwin H. Lee, Mayor  
Philip A. Ginsberg, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

Peter Slada

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Other:

916-275-2721

Berth Size:

80

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payments may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal:

☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

\$75.00  
12/15/11



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

1950 Scott Street, San Francisco, CA 94123

TEL: 415.931.6323 FAX: 415.293-7015 WEB: www.sfmarina.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE 2-22-12

APPLICANT NAME (First): Jason (Last): Holloway

MAILING ADDRESS: [REDACTED] (APT NO.) \_\_\_\_\_

(CITY) [REDACTED] (STATE) CA (ZIP) \_\_\_\_\_

TELEPHONE: (HOME) [REDACTED] (WORK): ( ) \_\_\_\_\_

CURRENT BOAT INFORMATION:

POWER: \_\_\_\_\_ SAIL: \_\_\_\_\_ LOA (Tip-to-Tip) \_\_\_\_\_ DRAFT \_\_\_\_\_

NO BOAT BUT PLAN TO GET: POWER: \_\_\_\_\_

SAIL: X

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' \_\_\_\_\_ 30' \_\_\_\_\_ 35' \_\_\_\_\_ 40' \_\_\_\_\_ 45' \_\_\_\_\_ 50' \_\_\_\_\_ 60' \_\_\_\_\_ 80' \_\_\_\_\_ 90' ✓

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to remain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ✓

Renewal: \_\_\_\_\_

Jason Holloway  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
3950 Scott St.  
San Francisco, CA 94123



Mayor's Office  
General Manager Philip A. Gristen

\$75.00  
CA 94123  
02/27/12



City and County of San Francisco  
Recreation and Park Department

San Francisco Marina Harbor

3950 Scott Street, San Francisco, CA 94123

TEL 415.831.6022 FAX 415.292.2015 WEB [www.sfrparks.org](http://www.sfrparks.org)

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First): PAUL (Last): REYFF

MAILING ADDRESS: [REDACTED] (APT NO.) [REDACTED]

(CITY) [REDACTED] (STATE) CA (ZIP) [REDACTED]

TELEPHONE (HOME) [REDACTED] (WORK): (415) 860-8955

CURRENT BOAT INFORMATION:

POWER: ☒ SAIL:        LOA (Tip-to-Tip) 90' DRAFT 6.5'

NO BOAT BUT PLAN TO GET: POWER:        SAIL:       

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25'    30'    35'    40'    45'    50'    60'    80'    90' ☒

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to remain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ☒

Renewal:       

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
3950 Scott St.  
San Francisco, CA 94123



Mayor Gavin Newsom  
General Manager Philip A. Stangor

\$75.00  
OK  
3/7/12

TO: Sunshine Task Force

FROM: Dominic Maionchi

RE: Complaint number 12058

4/24/2013

Dear Sunshine Ordinance Task Force Members,

On November 22nd, 2012 I requested copies of the un-redacted wait list contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out a form that requires a yearly fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available.

On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information and I was provided un-redacted berthing agreements complete with mailing addresses.

On December 11th, 2012 after 19 days, I received notice that they would not be providing the un-redacted documents.

San Francisco Park and Recreation has again violated section 67.21, specifically:

1. Section 67.21b by not complying in 10 days with the request, and
2. Section 67.24e1
3. Section 67.24i

I ask that the un-redacted wait list agreements be provided complete with mailing addresses.

RPD claims that these wait list agreements are not contracts. RPD defines a contract as an "agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." RPD claims that these agreements do not create an enforceable right. On the contrary, these wait list agreements do clearly provide an enforceable obligation on the part of RPD. Namely, they are to provide a slip when one

becomes available. If RPD did not provide a slip when available, the wait list applicant could enforce the agreement against RPD. Furthermore, there is consideration for this agreement in the form of a fee that has been approved by the controller's office. Simply pretending that this is not a contract does not make it something else.

RPD continues to argue that even if it is a contract that there is nothing in the sunshine ordinance that compels the city to disclose private residences that may be listed in the contract. RPD is again mistaken. First, the ordinance clearly states that contracts "shall be open for inspection immediately." The ordinance does not differentiate between contracts between businesses or individuals. Furthermore, a careful reading of the ordinance tells one that one should err on the side of disclosing information rather than not disclosing information. According to section 67.27 withholding is to be kept to a minimum. Furthermore, there is no exempt information on the wait list agreement under the California Public Records Act.

The un-redacted berthing agreements between the RPD and individuals were deemed by the Sunshine Task Force to be available under the Sunshine Ordinance to me on July 28, 2009. (Case 09032) The wait list agreements are no different and should also be made available to me un-redacted also. I would like the addresses so that I can inform the wait list applicants by mail to their contact address of transactions entered into by RPD that may have violated their right to a slip. In my opinion, that is why we have a Sunshine Ordinance in the first place; we need to keep everyone honest.

Regards,



Edwin H. Lane, Mayor  
Philip A. Glavin, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

NANCY MUELLER

NANCY S. MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Office:

Birth Date:

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 6<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payments may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal:

☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3850 Scott Street  
San Francisco, CA 94123

Handwritten notes and stamps: "172", "11/9/11", and other illegible markings.



Edson M. Lee, Mayor  
Dillon A. Gresham, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 3, 2011

Fred Pincus

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [REDACTED]  
Other: 510-304-4053

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List and be cancelled.

Renewal: ☒

Please make checks payable to:

Please return completed and signed application with payment to:

Signature of Applicant

San Francisco Marina

San Francisco Marina Wait List  
3950 Saint Street  
San Francisco, CA 94123

\$75.00  
CC

11 NOV 22 AM 2:25



Edwin H. Lee, Mayor  
Philip S. Christensen, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 3, 2011

Peter Slobo

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Office:

916-275-2721

Birth Date:

90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Sheriff's Court Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to reinitiate my name on the waiting list for Fiscal Year 201 (2012 ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal:

☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
2350 Scott Street  
San Francisco, CA 94123



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

3950 Scott Street, San Francisco, CA 94123

TEL: 415 831 6322 FAX: 415 398 2818 WEB: www.sfrp.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE 2-22-12

APPLICANT NAME (FIRST) JASON (LAST) HOLLOWAY

MAILING ADDRESS: [REDACTED] (APT NO.) [REDACTED]

(CITY) [REDACTED] (STATE) CA (ZIP) [REDACTED]

TELEPHONE (HOME) [REDACTED] (WORK) [REDACTED]

CURRENT BOAT INFORMATION:

POWER [REDACTED] SAIL [REDACTED] LOA (Tip-to-Tip) [REDACTED] DRAFT [REDACTED]

NO BOAT BUT PLAN TO GET: POWER [REDACTED] SAIL [X]

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application)

25' [REDACTED] 30' [REDACTED] 35' [REDACTED] 40' [REDACTED] 45' [REDACTED] 50' [REDACTED] 60' [REDACTED] 80' [REDACTED] 90' [X]

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to remain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: [X]

Renewal: [REDACTED]

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
3950 Scott St.  
San Francisco, CA 94123

\$75.00  
4770  
02/27/12



Meyer Gluck Neilsen  
General Manager Philip A. Ginsburg



City and County of San Francisco  
Recreation and Park Department

San Francisco Small Craft Harbor

1450 Scott Street, San Francisco, CA 94123

TEL: 415.331.8222 FAX: 415.292.7015 WEB: [www.sfdph.org](http://www.sfdph.org)

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First): PAUL (Last): REYER

MAILING ADDRESS: [REDACTED] (APT. NO.): [REDACTED]

(CITY): [REDACTED] (STATE): CA (ZIP): [REDACTED]

TELEPHONE (HOME): [REDACTED] (WORK): (415) 860-8955

CURRENT BOAT INFORMATION:

POWER: ☒ SAIL: \_\_\_\_\_ LOA (Tip-to-Tip): 90' DRAFT: 6.5'

NO BOAT BUT PLAN TO GET: POWER: \_\_\_\_\_ SAIL: \_\_\_\_\_

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' ☐ 30' ☐ 35' ☐ 40' ☐ 45' ☐ 50' ☐ 60' ☐ 80' ☐ 90' ☒

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Applicant: ☒

Renewal: \_\_\_\_\_

  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
1450 Scott St.  
San Francisco, CA 94123



Alison Garton-Hennessy  
General Manager Phillip A. Ginnipberg

*Handwritten notes:*  
\$75.00  
OK  
3/7/12



Edwin M. Lee, Mayor  
Philip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force  
From: Olive Gong, Custodian of Records, Recreation and Park Department  
Date: December 19, 2012  
Subject: Dominic Malonchi v. Recreation and Park Department  
Complaint # 12058

We write in response to the complaint Dominic Malonchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Malonchi alleges that RPD violated (1) "Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e1," and (3) "Section 67.24i." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Malonchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article 1, Section 1 of the California Constitution.

I. RPD Complied With Malonchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(f); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Malonchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Malonchi asked for "copies of the contracts for all people on the 90 foot wait list." <sup>1</sup>

RPD responded to Maionchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Maionchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Maionchi.

The Wait List applications Maionchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Maionchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Maionchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Maionchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

## II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

### 1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy," Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... In particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy," Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Malonchi [or any other member of the public] the personal information RPD redacted from the Wait List applications provided to Malonchi in response to his public records request.

## 2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1019 (1999); see also *Lotig v. Med. Bd.*, 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); *Sheet Metal Workers v. Dep't of Veteran Affairs*, 135 F.3d 891, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits, that would follow disclosure." *Id.* at 488. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id.* at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See *Sheet Metal Workers Int'l*, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Dep't of Defense*, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD - as required by RPD - they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

## 3. There is no Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information is Unrelated to RPD's Performance of its Duties.

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. *Braun v.*

City of Taft, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); Painting Industry of Hawaii v. Dept. of Air Force (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "what the government is up to"); Local 1274, Ill. Fed. of Teachers v. Niles (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); Voinche v. F.B.I. (D.D.C. 1996) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., Sonoma County Employees' Ret. Ass'n v. Superior Court, 198 Cal. App. 4th 986, 1006 (2011) (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 339 (2007) (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest -- which, so far as we can tell, is nil -- served by Motorichi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in City of San Jose, "[i]f it is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." *Id.* at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also Painting Indus. of Hawaii, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); Local 1274, Ill. Fed. of Teachers, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); Sheet Metal Workers, 135 F.3d at 903 ("the release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Maionchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Maionchi.

(iii) RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Maionchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

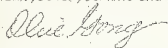
As an initial matter, the Wait List application forms that RPD provided Maionchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law," Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form -- the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[i]f the name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted," (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

A handwritten signature in cursive script, reading "Olive Gong". The signature is written in dark ink and is positioned above the printed name and title.

Olive Gong  
Custodian of Records

Attachments: Exhibit A

File No. 12058

SOTF Item No. 4

CAC Item No. \_\_\_\_\_

**SUNSHINE ORDINANCE TASK FORCE**  
AGENDA PACKET CONTENTS LIST

Sunshine Ordinance Task Force (SOTF)

Date: November 6, 2013

Compliance and Amendments Committee (CAC)

Date: \_\_\_\_\_

**CAC/SOTF**

<input type="checkbox"/>	<input checked="" type="checkbox"/>	Memorandum
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Order of Determination
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Complaint and Supporting documents
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Respondent's Response
<input type="checkbox"/>	<input type="checkbox"/>	Minutes
<input type="checkbox"/>	<input type="checkbox"/>	
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**OTHER**

<input type="checkbox"/>	<input type="checkbox"/>	_____
<input type="checkbox"/>	<input type="checkbox"/>	_____
<input type="checkbox"/>	<input type="checkbox"/>	_____
<input type="checkbox"/>	<input type="checkbox"/>	_____
<input type="checkbox"/>	<input type="checkbox"/>	_____

Completed by: A. Ausberry Date 10/25/13

Completed by: \_\_\_\_\_ Date \_\_\_\_\_

\*An asterisked item represents the cover sheet to a document that exceeds 75 pages.  
The complete document is in the file.



**ORDER OF DETERMINATION**

June 12, 2013

**DATE THE DECISION ISSUED**

May 1, 2013

*DOMINIC MAIONCHI V. RECREATION AND PARKS DEPARTMENT (CASE NO. 12058)*

**FACTS OF THE CASE**

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2012 records request, and that they also failed to provide unredacted copies of the records requested.

**COMPLAINT FILED**

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21(b), 67.24(e)(1), and 67.24(i) of the Ordinance.

**HEARING ON THE COMPLAINT**

On May 1, 2013, Complainant, Dominic Maionchi appeared before the Task Force and presented his claim. Respondent, Olive Gong, Custodian of Records, Recreation and Park Department presented Recreation and Park Department's defense.

The issue in the case is whether Recreation and Park Department violated Sections 67.21 and 67.24 of the Ordinance and/or Sections 6253 of the California Public Records Act.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based on the testimony and evidence presented the Task Force finds that the testimony of Complainant, Dominic Maionchi to be persuasive and finds that Section 67.26 of the Sunshine Ordinance to be applicable in this case. The Task Force does not find the testimony provided by Respondent, Olive Gong persuasive with regard to alleged violation of Section 67.26.

**DECISION AND ORDER OF DETERMINATION**

The Task Force finds that Recreation and Park Department violated Section 67.26 of the Sunshine Ordinance for illegal redaction of personal information contained in public records. The agency shall release the unredacted records requested within 5 business days of the issuance of this Order and appear before the Compliance and Amendments Committee on July 16, 2013.

This Order of Determination was adopted by the Sunshine Ordinance Task Force on May 1, 2013, by the following vote: (Knee / Hyland)

Ayes: Knee, Pilpel, Sims, Hyland, Oka, Fischer, Grant

Noes: David

Absent: Washburn



Kitt Grant, Chair

Sunshine Ordinance Task Force

- o: Jerry Threet, Deputy City Attorney
- Dominic Maionchi, Complaint
- Olive Gong, Recreation and Park Department, Respondent

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA  
City Attorney

OFFICE OF THE CITY ATTORNEY

JERRY THREET  
Deputy City Attorney

Direct Dial: (415) 554-3914  
Email: jerry.threet@sfgov.org

MEMORANDUM

TO: Sunshine Ordinance Task Force  
FROM: Jerry Threet  
Deputy City Attorney  
DATE: April 26, 2013  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

---

**BACKGROUND**

Complainant Dominic Maionchi ("Complainant") alleges that the Recreation and Parks Department ("the Department") failed to timely respond to his November 22, 2013 records request, and that they also failed to provide unredacted copies of the records requested.

**COMPLAINT**

On December 12, 2012, Complainant filed this complaint against the Department, alleging violations of Sections 67.21(b), 67.24(e)(1), and 67.24(i) of the Ordinance.

**JURISDICTION**

The Recreation and Parks Department is a charter department under the Ordinance. The Task Force therefore generally has jurisdiction to hear a complaint against the Department.

**APPLICABLE STATUTORY SECTION(S):**

Section 67 of the San Francisco Administrative Code:

- Section 67.21 governs responses to a public records request.
- Section 67.24 governs public information that must be disclosed under the Ordinance, notwithstanding exceptions under the Public Records Act.

Section 6250 et seq. of the Cal. Gov't Code

- Section 6253 governs the release of public records and the timing of responses.

**APPLICABLE CASE LAW:**

None.

**ISSUES TO BE DETERMINED**

**Uncontested/Contested Facts:** Complainant alleges as follows:

November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 2  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

---

RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24i I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.

In a letter dated December 19, 2011, Olive Gong responded on behalf of the Department to complaint. Gong first alleges that the records request was received by email after 5 p.m. on Thursday, November 22, 2012, which was a holiday and thus the Department was not open for business. Ms. Gong thus alleges that the Department actually received the request on Monday, November 26, 2012. She thus concludes that the Department's email response on December 2, 2012, 7 days later, was within the 10 day response time required by the Ordinance. Ms. Gong further alleges that the response included electronic copies of the five application forms for 90 foot berths that were responsive and in the Department's custody.

Ms. Gong further alleges that the Department redacted personal address and telephone information from the forms provided, but did not redact the names of the individuals or any business contact information that they may have provided. She further alleges that the redaction was done to protect the individual right of privacy of these applicants. Ms. Gong does not provide a copy of the email transmittal of these redacted documents, so it is unclear whether that email response explained the redaction or provided any justification for it to Complainant.

Ms. Gong further alleges that, upon receipt of the email and redacted documents, Complainant objected to the redactions the Department had performed on the documents. She further states that on December 11, 2012, the Department sent a writing to Complainant "explaining again why [the Department] was redacting home address and phone numbers from the application forms and providing legal citations for those redactions."

Ms. Gong's response to the Complaint then contains an extensive legal analysis of why the Department was justified in redacting the private contact information from the berth applications, which I will not repeat here.

**QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:**

- What exactly was the Department's written response on December 2, 2012?
- Did the Department's December 2, 2012 response include a written justification for the redaction of the documents provided and cite to the exemptions on which it relied for such redaction?

**LEGAL ISSUES/LEGAL DETERMINATIONS:**

- Did the Department timely respond to the records request under Section 67.21(b)?
- Were the records at issue covered by Section 67.24(e)(1) of the Ordinance?
- Did the Department respond in the manner required by Section 67.24 or the Ordinance?

MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 3  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE TRUE OR NOT TRUE.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 4  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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## SEC. 67.1 FINDINGS AND PURPOSE.

The Board of Supervisors and the People of the City and County of San Francisco find and declare:

- (a) Government's duty is to serve the public, reaching its decisions in full view of the public.
- (b) Elected officials, commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. The people do not cede to these entities the right to decide what the people should know about the operations of local government.
- (c) Although California has a long tradition of laws designed to protect the public's access to the workings of government, every generation of governmental leaders includes officials who feel more comfortable conducting public business away from the scrutiny of those who elect and employ them. New approaches to government constantly offer public officials additional ways to hide the making of public policy from the public. As government evolves, so must the laws designed to ensure that the process remains visible.
- (d) The right of the people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy interest government officials may use to prevent public access to information. Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority.
- (e) Public officials who attempt to conduct the public's business in secret should be held accountable for their actions. Only a strong Open Government and Sunshine Ordinance, enforced by a strong Sunshine Ordinance Task Force, can protect the public's interest in open government.
- (f) The people of San Francisco enact these amendments to assure that the people of the City remain in control of the government they have created.
- (g) Private entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected. However, when a person or entity is before a policy body or passive meeting body, that person, and the public, has the right to an open and public process.

SEC. 67.21. PROCESS FOR GAINING ACCESS TO PUBLIC RECORDS;  
ADMINISTRATIVE APPEALS.

- (a) Every person having custody of any public record or public information, as defined herein, (hereinafter referred to as a custodian of a public record) shall, at normal times and during normal and reasonable hours of operation, without unreasonable delay, and without requiring an appointment, permit the public record, or any segregable portion of a record, to be inspected and examined by any person and shall furnish one copy thereof upon payment of a reasonable copying charge, not to exceed the lesser of the actual cost or ten cents per page.
- (b) A custodian of a public record shall, as soon as possible and within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered to the office of the custodian by the requester orally or in writing by fax, postal delivery, or e-mail. If the custodian believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of this ordinance.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 5  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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(k) Release of documentary public information, whether for inspection of the original or by providing a copy, shall be governed by the California Public Records Act (Government Code Section 6250 et seq.) in particulars not addressed by this ordinance and in accordance with the enhanced disclosure requirements provided in this ordinance.

**SEC. 67.24. PUBLIC INFORMATION THAT MUST BE DISCLOSED.**

Notwithstanding a department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information and shall provide enhanced rights of public access to information and records:

**(e) Contracts, Bids and Proposals**

(1) Contracts, contractors' bids, responses to requests for proposals and all other records of communications between the department and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All bidders and contractors shall be advised that information provided which is covered by this subdivision will be made available to the public upon request. Immediately after any review or evaluation or rating of responses to a Request for Proposal ("RFP") has been completed, evaluation forms and score sheets and any other documents used by persons in the RFP evaluation or contractor selection process shall be available for public inspection. The names of scorers, graders or evaluators, along with their individual ratings, comments, and score sheets or comments on related documents, shall be made immediately available after the review or evaluation of a RFP has been completed.

(i) Neither the City, nor any office, employee, or agent thereof, may assert an exemption for withholding for any document or information based on a finding or showing that the public interest in withholding the information outweighs the public interest in disclosure. All withholdings of documents or information must be based on an express provision of this ordinance providing for withholding of the specific type of information in question or on an express and specific exemption provided by California Public Records Act that is not forbidden by this ordinance.

**CALIFORNIA PUBLIC RECORDS ACT****6254. EXEMPTION OF PARTICULAR RECORDS**

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

[...]

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

[...]

(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

## MEMORANDUM

TO: Sunshine Ordinance Task Force  
DATE: April 26, 2013  
PAGE: 6  
RE: Complaint 12058 – Maionchi v. SF Department of Recreation and Parks

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**CALIFORNIA CONSTITUTION, ART. I, § 3 (PROPOSITION 59) A. ARTICLE 1**

SEC. 3. (a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses. (Added Nov. 5, 1974. Amended by Stats. 2004, Res. c. 1 (S.C.A.1) (Prop. 59, approved Nov. 2, 2004, eff. Nov. 3, 2004).)

Ausberry, Andrea

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From: complaints@sfgov.org  
Sent: Wednesday, December 12, 2012 2:57 PM  
To: SOTF  
Subject: Sunshine Complaint

To:sotf@sfgov.org  
Email:complaints@sfgov.org  
DEPARTMENT:san francisco park and recreation  
CONTACTED:Olive Gong  
PUBLIC\_RECORDS\_VIOLATION:Yes  
PUBLIC\_MEETING\_VIOLATION:No  
MEETING\_DATE:

SECTIONS\_VIOLATED:67.21b 67.24e1 67.24i

DESCRIPTION:On November 22nd I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available. On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information. On December 11th, after 19 days, I received notice that they would not be providing the unredacted documents. San Francisco Park and Recreation has again violated section 67.21, specifically: 1. Section 67.21b by not complying in 10 days with the request, and 2. Section 67.24e1 3. Section 67.24i I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.

HEARING:Yes

PRE-HEARING:Yes

DATE:12/12/12

NAME:dominic maionchi

ADDRESS:250 avila street

CITY:san francisco ca

ZIP:94123

PHONE:4153858278

CONTACT\_EMAIL:dm567@pacbell.net

ANONYMOUS:

CONFIDENTIALITY\_REQUESTED:No

From: [dm567@pacbell.net](mailto:dm567@pacbell.net)  
To: SOTE  
Subject: Fwd: 90 foot slip  
Date: Friday, September 06, 2013 11:20:47 AM

---

The task force asked for my original sunshine request to rec and park.

Here it is.

As you can see from the emails, it is clear why I asked for the 90 foot wait list agreements. I actually told John what I would use them for, namely, to inform these people that their rights under their wait list agreement may have been violated.

Thanks

dom

Begin forwarded message:

From: "dm567@pacbell.net" <[dm567@pacbell.net](mailto:dm567@pacbell.net)>  
Subject: Re: 90 foot slip  
Date: November 22, 2012 5:18:10 PM PST  
To: "Moren, John" <[john.moren@sfgov.org](mailto:john.moren@sfgov.org)>  
Cc: Doug <[mail@matelot.com](mailto:mail@matelot.com)>  
Bcc: [nancenumber1@aol.com](mailto:nancenumber1@aol.com), Olive Gong <[Olive.Gong@sfgov.org](mailto:Olive.Gong@sfgov.org)>

John,

Are you never embarrassed?

I am requesting copies of the contracts for all people on the 90 foot wait list.

dom

On Nov 22, 2012, at 10:00 AM, Moren, John wrote:

Hello Mr. Maionchi,

The berth transfer you are concerned with was resolved in the best interest of the Marina in

accordance with our policies.

Best Regards,

John Moren, CMM  
Harbormaster  
San Francisco Marina Small Craft Harbor  
[john.moren@sfgov.org](mailto:john.moren@sfgov.org) | [sfreonline.org](http://sfreonline.org)

City & County of San Francisco • Recreation & Park Department • 501 Stanyan Street • San Francisco, CA 94117  
Tel 415.831.6322 • Fax 415.292.2015 • e-Mail: [john.moren@sfgov.org](mailto:john.moren@sfgov.org)

---

**From:** [dm567@pacbell.net](mailto:dm567@pacbell.net) [<mailto:dm567@pacbell.net>]  
**Sent:** Thursday, November 08, 2012 8:28 AM  
**To:** Moren, John  
**Subject:** 90 foot slip

Dear Mr. Moren,

RE: Slip transfer from Brooke Pierson to Robert Slobe and John Areias

I have reviewed the documents for the slip transfer and object to its legality under the past and present rules and regulations adopted by the SF Park and Recreations Department.

Facts:

Slip transfer occurred on August 31, 2012 from Brooke Pierson to Robert Slobe and John Areias

Robert Slobe and John Areias took title to the boat on June 8, 2012 as per the Coast Guard Documentation.

The previous owner of the boat is unknown from the file.

Notice was given to slip holder on 6/5/12 that back due slip fees of 23,176 dollars must be paid and statement of vessel ownership must be completed.

Slip holder as of 6/5/12 was past due in rent by approximately 23,000. Back due rent wasn't paid until 8/31/12

Statement of vessel ownership listing above mentioned partners is dated 8/31/2012

Vessel purchase agreement dated 3/18/10

Bill of sale dated 4/24/12

Applicable Rules and Regulations:

The rules and regulations of the SF Marina Small Craft Harbor were adopted by the

Recreation and Park Commission on April 19th, 2012.

The deadline for submitting statements of vessel ownership naming partners was July 1st, 2012.

Change of ownership for vessels and motor vehicles does not occur in CA until title transfers, in this case June 8, 2012.

#### Analysis:

1. This is an improper slip transfer because seller was in violation of the Rental Agreement at the time of the transfer. Brooke Pierson was over \$23,000 dollars in arrears. According to the signed Rental Agreement dated November 12th 2004, "Boat Owner agrees that his/her right to use the assigned berth shall terminate upon delinquency, for a period of 50 days, of the rental fee required under this agreement..." This language does not say "may" but rather "shall" terminate. Thus, the slip holder no longer had any legal claim to possession of the slip.

Having no legitimate legal right to the slip Brooke Pierson could not transfer the slip to the buyers. The transfer must be revoked.

2. This is an improper slip transfer because seller was in violation of the rules and regulations. The rules and regulations in effect prior to April 19th, 2012 require that "An owner, upon a bona fide sale of the boat berthed therein, with the **PRIOR (emphasis added)** approval of the Marina Manager and the payment of a transfer fee, may assign the berth to the buyer of the boat." Brooke Pierson did not inform the harbor of her intention of selling the boat prior to the sale and transfer of the slip as required by the past and present rules and regulations.

3. Furthermore this transaction cannot be considered a transfer among partners and should have been subject to the transfer fees imposed on April 19th, 2012. There is no evidence that Robert Slobe and John Areias were ever partners of Brooke Pierson and on the same title document at the same time.

a. The Bill of Sale demonstrates that buyers purchased 100% of the boat from Sellers on 4/24/12. They were not co-owners prior to this, nor after.

b. The statement of vessel ownership wasn't signed until after the deadline for declaring partners. Furthermore, at no time were Brooke Pierson, Robert Slobe and John Areias co-owners/partners of the vessel as per title as required by the rules and regulations.

c. The documents demonstrate that they were never partners even on August 31, 2012 because title was not held by all three concurrently.

4. Since this was not a transfer among partners for the reasons mentioned above, this transaction should be considered a sale invoking the one time transfer as per the rules and regulations adopted on April 19th, 2012 before title transferred. Thus buyers should not be allowed to transfer the slip in the future with the sale of the boat.

#### Conclusion:

1. The transaction should be cancelled and the slip returned to the marina because of violations of Marina Rules and Regulations and the Rental Agreement. Otherwise, if the slip transfer is upheld, such violations should be allowed to all slip holders going forward.

2. If the slip transfer is upheld, this was not a transfer among partners. Slobe and Areias purchased 100% of the boat from Brooke Pierson. Thus the one time slip transfer was invoked and cannot be used again by the buyers and in addition they owe the marina the slip transfer fee due to the sale. Otherwise, no boater should be required to pay any transfer fees on future one time slip transfers.

Questions:

1. If you agree with the analysis that this was an improper slip transfer, when will you revoke this transaction?
2. If you disagree with the analysis please explain why?
3. If you believe this is a proper slip transfer was the slip transfer fee not charged to buyers?
4. If you believe this is a proper slip transfer will the new owners be allowed a further transfer of the slip with the sale of the boat in the future?

Regards,

From: [dm567@pacbell.net](mailto:dm567@pacbell.net)  
To: SOTF  
Subject: Fwd: sunshine task force  
Date: Friday, September 06, 2013 11:12:05 AM

---

Please add this email to the file.

It shows that I asked that Phil be informed about the sunshine request.

dcm

Begin forwarded message:

From: "dm567@pacbell.net" <dm567@pacbell.net>  
Subject: sunshine task force  
Date: December 12, 2012 2:59:19 PM PST  
To: Olive Gong <[Olive.Gong@sfgov.org](mailto:Olive.Gong@sfgov.org)>  
Cc: [sotf@sfgov.org](mailto:sotf@sfgov.org)  
Bcc: [nancenumber1@aol.com](mailto:nancenumber1@aol.com), Doug <[mail@matelot.com](mailto:mail@matelot.com)>

Dear Olive Gong,

Please forward this to Phil Ginsberg.

This is a copy of my complaint to the sunshine task force that I filed online on 12/12/12:

On November 22nd, 2012 I requested copies of the contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out an application that requires a fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available.

On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information.

On December 11th, 2012 after 19 days, I received notice that they would not be providing the un-redacted documents.

San Francisco Park and Recreation has again violated section 67.21, specifically:

1. Section 67.21b by not complying in 10 days with the request, and
2. Section 67.24e1
3. Section 67.24i

I ask that the documents be provided immediately. I will waive the hearing if the documents are provided before the hearing takes place.

dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. E-mail transmission cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required please request a hard-copy version. This message is sent from a computer that is not secure and the authenticity of the sender may be in question.

**From:** [Gong, Olive](#)  
**To:** [SOTF](#)  
**Subject:** Response to COMPLAINT No. 12058, Dominic Malonchi v Recreation and Park  
**Date:** Wednesday, October 30, 2013 4:44:49 PM  
**Attachments:** [Malonchi vs RPD Case 12058 response for Aug 7, 2013 Hearing and Set 4....pdf](#)  
[Attachment- Letter to SOTF dated Dec 19, 2012 - Response to Complaint 12....pdf](#)

---

Good Afternoon Andrea,

I have attached RPD's response for the Nov 6, 2013 hearing. The response is the same as what had previously been sent for the previous hearings on October 2, 2013, Sept 4, 2013 and August 7, 2013.

I will be attending to represent the department.

Thank you for your help,  
Olive

Olive Gong  
San Francisco Recreation and Park Department | City & County of San Francisco  
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



Visit us at [sfrecpark.org](http://sfrecpark.org).  
Like us on [Facebook](#)  
Follow us on [Twitter](#)  
Watch us on [sfRecParkTV](#)  
Sign up for our [e-News](#)

*Reduce, Reuse, Recycle*

**From:** SOTF  
**Sent:** Thursday, October 24, 2013 4:57 PM  
**To:** 'dm567@pacbell.net'; Gong, Olive; Ginsburg, Phil; Ballard, Sarah; supreet.pabla@seiu1021.org; Christensen, Diana; Cantara, Gary; 'billandbobclark@access4less.net'; Lazar, Howard; Patterson, Kate; Ray Hartz Jr; Calvillo, Angela; Caldeira, Rick; Nevin, Peggy; Song, Jack; Jesson, Paula; 'Elizabeth Hewson'  
**Cc:** kitt grant; Lee, Cella; Threet, Jerry  
**Subject:** SOTF - NOTICE OF HEARING: Task Force Meeting November 6, 2013

Good Afternoon,

You are receiving this notice, because you are named as a Complainant or Respondent in one of the following complaints scheduled with the Sunshine Ordinance Task Force, 1) to hear the merits of the complaint 2) issue a determination and/or 3) complaint has been referred from a Task Force Committee.

1. COMPLAINT No. 12058, Dominic Maionchi v Recreation and Park
2. COMPLAINT No. 12059, Supreet Pabla, SEIU Local 1022 v Human Services

Agency

3. COMPLAINT No. 13025, William Clark v Arts Commission
4. COMPLAINT No. 13026, Ray Hartz, Jr. v Angela Calvillo, Clerk of the Board
5. COMPLAINT No. 13027, Ray Hartz, Jr. v Paula Jesson, Office of the City Attorney
6. COMPLAINT No. 13028, Charles Pitts v Community Housing Partnership
7. COMPLAINT No. 13029, Charles Pitts v Community Housing Partnership

Date: November 6, 2013

Location: City Hall, Room 408

Time: 4:00 p.m.

Complainants: Your attendance is required for this meeting/hearing.

Respondents/Departments: Pursuant to Section 67.21 (e) of the Ordinance, the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.

**Documentation (evidence supporting/disputing complaint)**

For a document to be considered, it must be received at least **five (5) working days** before the hearing (see attached Public Complaint Procedure).

For inclusion of the agenda packet, supplemental/supporting documents must be received by **12:00 pm, October 31, 2013**.

Thank you,

**Andrea S. Ausberry**

**Administrator**

Sunshine Ordinance Task Force

Office 415-554-7724 | Fax 415-554-5163

[sott@sfgov.org](mailto:sott@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)

City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244

San Francisco, CA 94102

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Maureen Givens, Director  
Philip A. Grogan, General Manager

Honorable Members  
Sunshine Ordinance Task Force  
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244  
San Francisco, CA 94102

July 29, 2013

Sent via email

**Re: Complaint#12058 – Dominic Maionchi vs. Recreation and Park Department**

Dear Honorable Members of the Sunshine Ordinance Task Force:

This matter concerns the Recreation and Park Department's lawful redaction on privacy grounds of individuals' home addresses and home phone numbers from records the Department provided to the Complainant in response to his public records request. As explained in the Department's detailed submission to the Task Force on December 19, 2012 (attached hereto for your reference), the Department redacted individuals' private residence addresses and home phone numbers from these records in order to protect those individuals' personal right to privacy in accordance with specific provisions of the California Constitution and the California Public Records Act.

When the Task Force first heard this matter on May 1, 2013, it found that the Department had violated Section 67.26 of the Sunshine Ordinance and ordered the Department to disclose the individuals' home addresses and phone numbers. The Department declined to disclose this personal contact information on the privacy grounds set forth in its December 19th letter. On July 16, 2013, the Compliance and Amendments Committee voted to send the case back to the full Task Force with the recommendation that it be referred to the Ethics Commission for a finding of a willful violation of the Sunshine Ordinance under Section 67.34.

For the reasons set forth in our December 19th letter, the Department has not violated the Sunshine Ordinance. And the Department certainly has not committed a "willful violation." The Ethics Commission's *Regulations for Violations of the Sunshine Ordinance* (effective January 25, 2013) define "willful violation" as "an action or failure to act with the knowledge that such act or failure to act was a violation of the Sunshine Ordinance." A department's disagreement with the Task Force's interpretation of the Sunshine Ordinance does not constitute a willful violation. Further, in deciding to





Mayor Gavin Newsom  
Philip A. Censaburg, General Manager

withhold from disclosure the individuals' home addresses and phone numbers to protect their right to privacy, the Department sought and followed the advice of the City Attorney's Office. Indeed, the City Attorney's Good Government Guide instructs that "the general rule is that departments should not disclose home addresses, personal phone numbers, or personal e-mail addresses of members of the public. Such personal contact information typically sheds no light on the operations of City government." City Attorney's Good Government Guide, 2010-11 edition, p. 94. Given that the Department was acting on a well-founded belief that its redactions complied with the Sunshine Ordinance, and was following in good faith the advice of legal counsel, there is no basis for finding a "willful violation" in this case. Accordingly, the Department respectfully submits that there is no legal basis for referring this matter to the Ethics Commission.

Finally, we note that at its July 16 hearing, the Compliance and Amendments Committee also stated that the City Attorney's Office violated Section 67.21(i) of the Ordinance by advising the Department on this matter. While this allegation is directed against the City Attorney's Office, it is relevant to our operations as a City department. Under the City Charter, the City Attorney is our legal counsel, and we may consult with the City Attorney's Office on legal issues, including public records issues.

Thank you for your time and consideration.

Olive Gong  
Custodian of Records

Attachments: Letter to SOTF dated December 19, 2012



Ernest M. Lee, Mayor  
Philip A. Gotsdiner, General Manager

**SAN FRANCISCO MARINA**  
**WAIT LIST RENEWAL APPLICATION**  
**2011/2012 FISCAL YEAR**

November 2, 2011

NANCY MUELLER

NANCY S. MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [redacted] O.K.

Other: 0

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: ☒ X

Signature of Applicant

LUCA BERGATTI  
FOR  
NANCY S. MUELLER

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

\$75.00  
4/17/12  
11/9/11



Edwin H. Lee, Mayor  
Philip A. Greubing, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

Neil Pincus  
[Redacted Address]

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [Redacted]

Other: 510-804-4055

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: ☒

  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

\$75.00  
cc

11 NOV 22 AM 2:25

SAN FRANCISCO MARINA



Edwin M. Lee, Mayor  
Philip A. Gresham, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

Peter Slobe

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Other:

916-275-2721

Berth Size:

90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal:

☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3959 Scott Street  
San Francisco, CA 94123

12/15/11  
\$75.00  
CASH



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

1950 Scott Street, San Francisco, CA 94123

TEL 415 831 6322 FAX 415 292-7015 WEB [www.sfdmarina.org](http://www.sfdmarina.org)

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE: 2-22-12

APPLICANT NAME (First): Jason (Last): Holloway

MAILING ADDRESS: \_\_\_\_\_ (APT NO.) \_\_\_\_\_

(CITY): \_\_\_\_\_ (STATE): CA (ZIP): \_\_\_\_\_

TELEPHONE: (HOME) \_\_\_\_\_ (WORK): \_\_\_\_\_

CURRENT BOAT INFORMATION:

POWER \_\_\_\_\_ SAIL \_\_\_\_\_ LOA (Tip-to-Tip) \_\_\_\_\_ DRAFT \_\_\_\_\_

NO BOAT BUT PLAN TO GET: POWER: \_\_\_\_\_ SAIL: ☒

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' \_\_\_\_\_ 30' \_\_\_\_\_ 35' \_\_\_\_\_ 40' \_\_\_\_\_ 45' \_\_\_\_\_ 50' \_\_\_\_\_ 60' \_\_\_\_\_ 80' \_\_\_\_\_ 90' ☒

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ☒

Renewal: \_\_\_\_\_

Jason Holloway  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
1950 Scott St.  
San Francisco, CA 94123



Mayor Gavin Newsom  
General Manager Phillip A. Ginsburg

\$75.00  
OK 2/15  
02/27/12



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

3950 Scott Street, San Francisco, CA 94123

TEL 415.831.6322 FAX 415.293.3015 WEB: www.sfrpn.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE 3/1/12

APPLICANT NAME (First): PAUL (Last) REYFF

MAILING ADDRESS: [REDACTED] (APT NO.) [REDACTED]

(CITY) [REDACTED] (STATE) CA (ZIP) [REDACTED]

TELEPHONE (HOME) [REDACTED] (WORK) (415) 860-8955

CURRENT BOAT INFORMATION

POWER ☒ SAIL        LOA (Tip-to-Tip) 90' DRAFT 6.5'

NO BOAT BUT PLAN TO GET: POWER        SAIL       

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25'    30'    35'    40'    45'    50'    60'    80'    90' ☒

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application. ☒

Renewal       

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
3950 Scott St.  
San Francisco, CA 94123



Mayor Gavin Newsom  
General Manager Philip A. Ginsburg

*Handwritten:*  
\$75.00  
OK #2315  
3/7/12



Edwin M. Lee, Mayor  
Phillip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force  
From: Olive Gong, Custodian of Records, Recreation and Park Department  
Date: December 19, 2012  
Subject: Dominic Maionchi v. Recreation and Park Department  
Complaint # 12058

We write in response to the complaint Dominic Maionchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Maionchi alleges that RPD violated (1) "Section 67.21b by not complying in 10 days with the request;" (2) "Section 67.24e1," and (3) "Section 67.24i." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Maionchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article 1, Section 1 of the California Constitution.

I. RPD Complied With Maionchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(j); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Maionchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Maionchi asked for "copies of the contracts for all people on the 90 foot wait list."

1

RPD responded to Maionchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Maionchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Maionchi.

The Wait List applications Maionchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Maionchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Maionchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Maionchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

## II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

### 1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Maionchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Maionchi in response to his public records request.

## **2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.**

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1019 (1999); see also *Lorig v. Med. Bd.*, 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); *Sheet Metal Workers v. Dep't of Veteran Affairs*, 135 F.3d 891, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits, that would follow disclosure." *Id.* at 488. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id.* at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See *Sheet Metal Workers Int'l*, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Dep't of Defense*, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD – as required by RPD – they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

## **3. There Is no Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information Is Unrelated to RPD's Performance of Its Duties.**

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. *Braun v.*

City of Taft, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); *Painting Industry of Hawaii v. Dept. of Air Force* (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "what the government is up to"); Local 1274, Ill. Fed. of Teachers v. Niles (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); *Voinche v. F.B.I.* (D.D.C. 1996) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., *Sonoma County Employees' Ret. Ass'n v. Superior Court*, 198 Cal. App. 4th 986, 1006 (2011) (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); *Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 339 (2007) (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest – which, so far as we can tell, is nil – served by Maionchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in *City of San Jose*, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." *Id.* at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also *Painting Indus. of Hawaii*, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); Local 1274, Ill. Fed. of Teachers, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); *Sheet Metal Workers*, 135 F.3d at 903 ("The release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Maionchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Maionchi.

### III. RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Maionchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

As an initial matter, the Wait List application forms that RPD provided Maionchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form -- the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[t]he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

A handwritten signature in cursive script, appearing to read "Olive Gong".

Olive Gong  
Custodian of Records

Attachments: Exhibit A



Ausberry, Andrea

---

From: dm567@pacbell.net  
Sent: Tuesday, July 16, 2013 6:20 PM  
To: Ginsburg, Phil  
Cc: SOTF  
Subject: Fwd: SOTF - NOTICE of Hearing - CAC July 16, 2013

Dear Mr. Ginsburg,

I attended the below mentioned hearing today. The committee voted unanimously today that it go back to the full board with a recommendation for this matter to go to the ethics commission.

I have previously informed you of your department's decision not to comply with the Order of Determination of the Sunshine Task Force. I hope that open government is important to you and ask that you order your department to release the documents without redactions. As the head of the Recreation and Park Department the authority and responsibility rests directly with you.

Regards,

dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

Begin forwarded message:

From: SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)>  
Subject: SOTF - NOTICE of Hearing - CAC July 16, 2013  
Date: July 10, 2013 12:53:12 PM PDT  
To: "Gong, Olive" <[olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)>, "dm567@pacbell.net" <[dm567@pacbell.net](mailto:dm567@pacbell.net)>  
Cc: "Grant, Kitt ([sunshinechairgrant@gmail.com](mailto:sunshinechairgrant@gmail.com))" <[sunshinechairgrant@gmail.com](mailto:sunshinechairgrant@gmail.com)>, "Knee, Richard ([rak0408@earthlink.net](mailto:rak0408@earthlink.net))" <[rak0408@earthlink.net](mailto:rak0408@earthlink.net)>, "Washburn, Allyson ([amwashburn@comcast.net](mailto:amwashburn@comcast.net))" <[amwashburn@comcast.net](mailto:amwashburn@comcast.net)>

Good Afternoon,

This is notice that your complaint has been scheduled with the Compliance and Amendments Committee, of the Sunshine Ordinance Task Force regarding the following titled complaint, to review the status of and ascertain compliance with the Task Force's Order of Determination.

1. **COMPLAINT No. 12058:** Hearing on the status of the Order of Determination of Dominic Maionchi against Recreation and Park for allegedly failing to provide records requested pertaining to berthing contracts between the City and County of San Francisco and slip holders.

Date: July 16, 2013  
Location: City Hall, Room 408  
Time: 4:00 p.m.

Complainant: Your attendance is required at this meeting/hearing. Please notify the Office of the Sunshine Ordinance Task Force if you are not able to attend.

Respondent/Department: Pursuant to Section 67.21 (e) of the Ordinance, the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.

For inclusion of the agenda packet, supplemental/supporting documents must be received by 12:00 pm, July 12, 2013.

Kind regards,

**Andrea S. Ausberry**  
Administrator  
Sunshine Ordinance Task Force  
Office 415.554.7724 | Fax 415.554.5163  
[sott@sfgov.org](mailto:sott@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)  
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244  
San Francisco, CA 94102  
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Ausberry, Andrea

---

From: dm567@pacbell.net  
Sent: Tuesday, June 04, 2013 8:26 AM  
To: SOTF  
Subject: Re: Sunshine Complaint Received: Case No. 12058 Dominic Maionchi v Recreation and Park

Re: Sunshine Complaint Received: Case No. 12058 Dominic Maionchi v Recreation and Park

Andrea,

Rec and Park is refusing to provide the documents. They tell me I already received them. How do I get this case assigned to a committee of the task force for enforcement follow up?

I am now officially filing a second complaint with the task force for the same documents. Put me on the docket.

Dom

dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

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Ausberry, Andrea

---

From: dm567@pacbell.net  
Sent: Tuesday, June 04, 2013 4:07 PM  
To: Gong, Olive  
Cc: SOTF  
Subject: Re: Response to your sunshine request

Dear Olive,

Are the powers that be aware that the Sunshine Task Force Ruled that the documents should not be redacted in their ruling?

Is your department refusing to abide by their ruling?

Regards,

dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

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On Jun 4, 2013, at 4:01 PM, "Gong, Olive" <[olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)> wrote:

Hi Dominic,

We have received the documents requested in your request dated 5-31-2013, received Monday, 6-3-2013 (and copied below) and will send them to you as soon as they have been reviewed and by the deadline of 6-13-2013, though I expect to have them ready by tomorrow.

In your new request, dated 6-4-2013, you asked to see original documents, however, as mentioned previously, we do not release waiting information without redacting personal information first.

Let me know if you have any further questions,  
Olive

Olive Gong

San Francisco Recreation and Park Department | City & County of San Francisco  
McLaren Lodge in Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



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*Reduce, Reuse, Recycle*



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**From:** [dm567@pacbell.net](mailto:dm567@pacbell.net) [mailto:[dm567@pacbell.net](mailto:dm567@pacbell.net)]

**Sent:** Friday, May 31, 2013 8:41 PM

**To:** Gong, Olive

**Subject:** Re: sunshine request

Dear Olive,

This email is meant for you.

This is a NEW Sunshine request in addition to my sunshine request on May 29th.

Please send me the wait list applications (contracts) for the 90 foot wait list as they are in the records as of today. There may have been changes to them since the last time I received them? Please don't tell me that there have been no changes. I would like to see copies of them as they sit in the files today.

Dom

dominic maionchi

[dm567@pacbell.net](mailto:dm567@pacbell.net)

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TO: Sunshine Task Force

FROM: Dominic Maionchi

RE: Complaint number 12058

4/24/2013

Dear Sunshine Ordinance Task Force Members,

On November 22nd, 2012 I requested copies of the un-redacted wait list contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out a form that requires a yearly fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available.

On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information and I was provided un-redacted berthing agreements complete with mailing addresses.

On December 11th, 2012 after 19 days, I received notice that they would not be providing the un-redacted documents.

San Francisco Park and Recreation has again violated section 67.21, specifically:

1. Section 67.21b by not complying in 10 days with the request, and
2. Section 67.24e1
3. Section 67.24i

I ask that the un-redacted wait list agreements be provided complete with mailing addresses.

RPD claims that these wait list agreements are not contracts. RPD defines a contract as an "agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." RPD claims that these agreements do not create an enforceable right. On the contrary, these wait list agreements do clearly provide an enforceable obligation on the part of RPD. Namely, they are to provide a slip when one

## SOTF

---

From: dm567@pacbell.net  
Sent: Saturday, January 26, 2013 8:40 AM  
To: SOTF  
Cc: Gong, Olive  
Subject: Fwd: Mediation Response Received -SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept  
Attachments: Response to Complaint 12058 - Dominic Maionchi v Rec and Park Dept.pdf; Exhibit A.pdf

Dear Andrea,

I have not heard back. I informed you that the documents did not complete my request. See below. Have you scheduled a hearing date yet?

Thank you,

dom

dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

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Begin forwarded message:

From: "dm567@pacbell.net" <dm567@pacbell.net>  
Subject: Re: Mediation Response Received -SOTF Complaint 12058 - Dominic Maionchi v Rec and Park Dept  
Date: December 21, 2012 10:35:30 AM PST  
To: SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)>

Dear Honorable Members, Sunshine Ordinance Task Force,

The provided documents do not complete my request. Please schedule a hearing date.

The documents provided do not

dominic maionchi  
[dm567@pacbell.net](mailto:dm567@pacbell.net)

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On Dec 20, 2012, at 6:38 PM, SOTF <[sotf@sfgov.org](mailto:sotf@sfgov.org)> wrote:

Good Afternoon,

The SOTF Office is in receipt of a response from the Recreation and Park Department ,regarding your above mentioned complaint case.

The Respondent was notified of your complaint, in an attempt to mediate and stave off a hearing before the Sunshine Ordinance Task Force. The following email and attached documents are the Respondent's response/records you requested.

The SOTF Office will consider your case to be resolved. Unless you respond to whether the documents the Respondent has provided completes your request.

Thank you,

Andrea S. Ausberry  
Administrator  
Sunshine Ordinance Task Force  
Office 415.554.7724 | Fax 415.554.5163

[sotf@sfgov.org](mailto:sotf@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)

City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244

San Francisco, CA 94102

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**From:** Gong, Olive

**Sent:** Wednesday, December 19, 2012 3:18 PM

**To:** SOTF

**Cc:** Ausberry, Andrea; McArthur, Margaret

**Subject:** Response to SOTF Complaint 12058 - Dominic Malonchi v Rec and Park Dept

Dear SOTF,

Please see attached response to Complaint # 12058 - Dominic Malonchi v Rec and Park Dept.

Olive Gong

San Francisco Recreation and Park Department | City & County of San Francisco

McLaren Lodge In Golden Gate Park | 501 Stanyan Street | San Francisco, CA | 94117

(415) 831.2708 | [olive.gong@sfgov.org](mailto:olive.gong@sfgov.org)



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*Reduce, Reuse, Recycle*



Edwin M. Cae, Mayor  
Philip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force  
From: Olive Gong, Custodian of Records, Recreation and Park Department  
Date: December 19, 2012  
Subject: Dominic Maionchi v. Recreation and Park Department  
Complaint # 12058

We write in response to the complaint Dominic Maionchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Maionchi alleges that RPD violated (1) "Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e1," and (3) "Section 67.24i." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Maionchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article I, Section 1 of the California Constitution.

I. RPD Complied With Maionchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(f); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Maionchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Maionchi asked for "copies of the contracts for all people on the 90 foot wait list."<sup>1</sup>

RPD responded to Maionchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Maionchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Maionchi.

The Wait List applications Maionchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Maionchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Maionchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Maionchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

## II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

### 1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means refraining

from disclosing to Maionchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Maionchi in response to his public records request.

## **2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.**

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1019 (1999); see also *Lorig v. Med. Bcl.*, 78 Cal. App. 4th 462, 468 (2000) ("individuals have a substantial privacy interest in their home addresses"); *Sheet Metal Workers v. Dep't of Veteran Affairs*, 135 F.3d 891, 904 (3d Cir. 1998) (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits, that would follow disclosure." *Id.*, at 488. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id.* at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See *Sheet Metal Workers Int'l*, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Dep't of Defense*, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD - as required by RPD - they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

## **3. There is No Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information is Unrelated to RPD's Performance of Its Duties.**

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. *Braun v.*

City of Taft, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" City of San Jose, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., Dep't of Defense, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); *Painting Industry of Hawaii v. Dept. of Air Force* (9th Cir. 1994) 26 F.3d 1479; 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "what the government is up to"); *Local 1274, Ill. Fed. of Teachers v. Niles* (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); *Voinche v. F.B.I.* (D.D.C. 1996) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., *Sonoma County Employees' Ret. Ass'n v. Superior Court*, 198 Cal. App. 4th 986, 1006 [2011] (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); *Int'l Fed'n of Profl & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 339 [2007] (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest – which, so far as we can tell, is nil – served by Malonchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in *City of San Jose*, "[i]f it is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]," 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." *Id.* at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." Dep't of Defense, 510 U.S. at 497; see also *Painting Indus. of Hawaii*, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); *Local 1274, Ill. Fed. of Teachers*, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); *Sheet Metal Workers*, 135 F.3d at 903 ("The release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Maionchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Maionchi.

iii. RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Maionchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

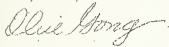
As an initial matter, the Wait List application forms that RPD provided Maionchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill-out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work or services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form -- the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[t]he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

A handwritten signature in cursive script, reading "Olive Gong". The signature is written in dark ink and is positioned above the printed name and title.

Olive Gong  
Custodian of Records

Attachments: Exhibit A





Edwin H. Lee, Mayor  
Philip A. Gansbøl, Port and Marina Director

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

NANCY S. MUELLER

NANCY S. MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Office:

Birth Date:

90

Please return this completed and signed Renewal Application in combination with the annual Wait List Renewal Fee of Seventy-Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy-Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal:

X

Signature of Applicant

NANCY S. MUELLER

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
2030 Scott Street  
San Francisco, CA 94113

\$75.00  
11/9/11



John M. Lee, Mayor  
Philip A. Garibay, General Manager

**SAN FRANCISCO MARINA**  
**WAIT LIST RENEWAL APPLICATION**  
**2011/2012 FISCAL YEAR**

November 2, 2011

Neil Phicus

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: [REDACTED]  
Other: 510-504-1035

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing in the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal: ☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

\$75.00  
ce

52-2 HW 32 NOV 11



Edson M. Lee, Mayor  
Philip A. Ginsburg, General Manager

**SAN FRANCISCO MARINA  
WAIT LIST RENEWAL APPLICATION  
2011/2012 FISCAL YEAR**

November 2, 2011

Peter Stohr

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Other: 916-275-2721

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth in the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my good standing on the Waiting List may be cancelled.

Renewal:

X

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

\$75.00  
12/15/11  
12/15/11



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

3950 Scott Street, San Francisco, CA 94123

TEL: 415-831-8122 FAX: 415-293-0015 Web: [www.sfdca.org](http://www.sfdca.org)

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH ~~YOUR~~ OUR \$75.00 FEE

WAIT LIST APPLICATION

DATE: 2-22-12  
APPLICANT NAME (FIRST): JASON (LAST): HOLLWAY  
MAILING ADDRESS: \_\_\_\_\_ (APT. NO.): \_\_\_\_\_  
(CITY): \_\_\_\_\_ (STATE): CA (ZIP): \_\_\_\_\_  
TELEPHONE: (HOME): \_\_\_\_\_ (WORK): \_\_\_\_\_

CURRENT BOAT INFORMATION:

POWER: \_\_\_\_\_ SAIL: \_\_\_\_\_ LOA (Tip-to-Tip): \_\_\_\_\_ DRAFT: \_\_\_\_\_  
NO BOAT BUT PLAN TO GET: POWER: \_\_\_\_\_ SAIL: X

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' ☐ 30' ☐ 35' ☐ 40' ☐ 45' ☐ 50' ☐ 60' ☐ 80' ☐ 90' ☒

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ☒

Renewal: ☐

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
3950 Scott St.  
San Francisco, CA 94123

\$75.00  
OK 2/15  
02/27/12



Kayla Davis Newman  
General Manager Phillip A. Ginzberg



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

1950 Scott Street, San Francisco, CA 94123

TEL: 415.831.6312 FAX: 415.297.2016 WEB: www.sfdph.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE: 3/1/12

APPLICANT NAME (First): PAUL (Last): REYFF

MAILING ADDRESS: [REDACTED] (APT NO.) [REDACTED]

(CITY): [REDACTED] (STATE): CA (ZIP): [REDACTED]

TELEPHONE (HOME): [REDACTED] (WORK): (415) 860-8955

CURRENT BOAT INFORMATION

POWER: ☒ SAIL: [REDACTED] LOA (Tip-to-Tip): 90' DRAFT: 6.5'

NO BOAT BUT PLAN TO GET: POWER: [REDACTED] SAIL: [REDACTED]

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application):

23' ☐ 30' ☐ 35' ☐ 40' ☐ 45' ☐ 50' ☐ 60' ☐ 80' ☐ 90' ☒

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to retain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application: ☒

Renewal: [REDACTED]

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
1950 Scott St.  
San Francisco, CA 94123



Mayor Gavin Newsom  
General Manager Phillip A. Grunburg

\$75.00  
OK  
3/7/12

TO: Sunshine Task Force

FROM: Dominic Maionchi

RE: Complaint number 12058

4/24/2013

Dear Sunshine Ordinance Task Force Members,

On November 22nd, 2012 I requested copies of the un-redacted wait list contracts for all people on the 90 foot wait list at the SF Marina. Members of the public fill out a form that requires a yearly fee. These applications are contracts between the applicant and the City and County of San Francisco to provide a berth when one should become available.

On August 5, 2009, I made a similar request for copies of un-redacted berthing contracts between the agency and slip holders and was denied. I filed a complaint and on July 28, 2009 received a finding in my favor. (DOMINIC MAIONCHI v. RECREATION AND PARK DEPARTMENT (09032)) The Task Force found that the agency violated Section 67.24 for withholding information and I was provided un-redacted berthing agreements complete with mailing addresses.

On December 11th, 2012 after 19 days, I received notice that they would not be providing the un-redacted documents.

San Francisco Park and Recreation has again violated section 67.21, specifically:

1. Section 67.21b by not complying in 10 days with the request, and
2. Section 67.24e1
3. Section 67.24i

I ask that the un-redacted wait list agreements be provided complete with mailing addresses.

RPD claims that these wait list agreements are not contracts. RPD defines a contract as an "agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." RPD claims that these agreements do not create an enforceable right. On the contrary, these wait list agreements do clearly provide an enforceable obligation on the part of RPD. Namely, they are to provide a slip when one

becomes available. If RPD did not provide a slip when available, the wait list applicant could enforce the agreement against RPD. Furthermore, there is consideration for this agreement in the form of a fee that has been approved by the controller's office. Simply pretending that this is not a contract does not make it something else.

RPD continues to argue that even if it is a contract that there is nothing in the sunshine ordinance that compels the city to disclose private residences that may be listed in the contract. RPD is again mistaken. First, the ordinance clearly states that contracts "shall be open for inspection immediately." The ordinance does not differentiate between contracts between businesses or individuals. Furthermore, a careful reading of the ordinance tells one that one should err on the side of disclosing information rather than not disclosing information. According to section 67.27 withholding is to be kept to a minimum. Furthermore, there is no exempt information on the wait list agreement under the California Public Records Act.

The un-redacted berthing agreements between the RPD and individuals were deemed by the Sunshine Task Force to be available under the Sunshine Ordinance to me on July 28, 2009. (Case 09032) The wait list agreements are no different and should also be made available to me un-redacted also. I would like the addresses so that I can inform the wait list applicants by mail to their contact address of transactions entered into by RPD that may have violated their right to a slip. In my opinion, that is why we have a Sunshine Ordinance in the first place; we need to keep everyone honest.

Regards,



Edwin H. Lee, Mayor  
 David S. Lee, Treasurer

**SAN FRANCISCO MARINA  
 WAIT LIST RENEWAL APPLICATION  
 2011/2012 FISCAL YEAR**

November 2, 2011

**NANCY S. MUELLER**

NANCY MUELLER

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home: 415  
 Office:

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and your standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my boat number on the Waiting List or may be cancelled.

Renewal: ☒

Signature of Applicant

San Francisco Marina

Please make checks payable to:

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
 3050 Scott Street  
 San Francisco, CA 94133

NANCY S. MUELLER



Edwin M. Lee, Mayor  
 Peter S. Ardella, Council Member

**SAN FRANCISCO MARINA  
 WAIT LIST RENEWAL APPLICATION  
 2011/2012 FISCAL YEAR**

November 2, 2011

Bert: Philip

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home:

Other: 510-564-4055

Berth Size: 90

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and good standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a complete application, correct contact information and a non-refundable Seventy Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011/2012 (ending June 30<sup>th</sup>, 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any change in my contact information, or my good standing on the Waiting List may be cancelled.

Renewal: ☒

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application with payment to:

San Francisco Marina Wait List  
 3949 Scott Street  
 San Francisco, CA 94123

\$75.00  
 CE

52-2011-22-2011

UNIVERSITY

McLaren Center for the Golden Gate Bridge | 501 Steiner Street | San Francisco, CA 94117 | PHONE (415) 431-7000 WEB: [www.sfm.org](http://www.sfm.org)



Erwin H. van Mavor  
Theresa A. Gendron, General Manager

**SAN FRANCISCO MARINA**  
**WAIT LIST RENEWAL APPLICATION**  
**2011/2012 FISCAL YEAR**

November 1, 2011

Four Slots

We would appreciate your confirmation of the address and contact telephone information associated with your San Francisco Marina Wait List Renewal Application.

Home

Other

415-275-2731

Boat Size: 30

Please return this completed and signed Renewal Application in conjunction with the annual Wait List Renewal Fee of Seventy-Five Dollars (\$75.00).

Your Renewal Application with payment is due by the end of business on Wednesday November 16<sup>th</sup>, 2011. Failure to submit a completed application and payment by the due date indicated may void your application and boat standing on the waiting list.

I hereby submit my renewal Wait List Application for a berth at the San Francisco Marina Small Craft Harbor. I understand that it is my responsibility to provide a completed application, correct contact information and a non-refundable Seventy-Five Dollar (\$75.00) annual application fee to retain my name on the waiting list for Fiscal Year 2011-2012 (ending June 30<sup>th</sup> 2012).

I understand that I am solely responsible for supplying all the requested information, signing the application, and that any incomplete Wait List Renewal Application form may be returned to me. Incomplete Wait List Renewal Applications or insufficient payment may disqualify me. I understand that I am responsible for informing San Francisco Marina in writing of any changes to my contact information or my boat standing on the Waiting List form be cancelled.

Renewal

X

Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed and signed application  
with payment to:

San Francisco Marina Wait List  
3950 Scott Street  
San Francisco, CA 94123

\$75.00  
12/15/11



City and County of San Francisco  
Recreation and Park Department

San Francisco Yacht Harbor

1950 Scott Street, San Francisco, CA 94123

TEL: 415.331.6322 FAX: 415.298.7015 WEB: www.sfdph.org

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAITLIST APPLICATION

DATE 7-22-12

APPLICANT NAME (First) T. Aspin (Last) McHale

MAILING ADDRESS \_\_\_\_\_ (APT NO) \_\_\_\_\_

(CITY) \_\_\_\_\_ (STATE) CA (ZIP) \_\_\_\_\_

TELEPHONE (HOME) \_\_\_\_\_ (WORK) \_\_\_\_\_

CURRENT BOAT INFORMATION

POWER \_\_\_\_\_ SAIL \_\_\_\_\_ LOA (Tip-to-Tip) \_\_\_\_\_ DRAFT \_\_\_\_\_

NO BOAT BUT PLAN TO GET POWER \_\_\_\_\_ SAIL X

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application)

25' \_\_\_\_\_ 30' \_\_\_\_\_ 35' \_\_\_\_\_ 40' \_\_\_\_\_ 45' \_\_\_\_\_ 50' \_\_\_\_\_ 60' \_\_\_\_\_ 80' \_\_\_\_\_ 90' X

I hereby request that my application for a berth at the San Francisco Marine Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to remain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application X

Renewal \_\_\_\_\_

Please make checks payable to:

Please return completed form to:

San Francisco Marina

San Francisco Marina Wait List  
1950 Scott St  
San Francisco, CA 94123



Mayor Gordon Newsom  
General Manager Philip A. Croushore



City and County of San Francisco  
Recreation and Park Department

San Francisco Marina Harbor

1950 Scott Street, San Francisco, CA 94123

TEL: 415.831-6322 FAX: 415.292.2010 WEB: [www.sfdph.org](http://www.sfdph.org)

PLEASE COMPLETE THE FORM BELOW AND RETURN WITH YOUR \$75.00 FEE

WAIT LIST APPLICATION

DATE 3/1/12

APPLICANT NAME (First) PAUL (Last) REYFF

MAILING ADDRESS [REDACTED] (APT NO.) [REDACTED]

(CITY) [REDACTED] (STATE) CA (ZIP) [REDACTED]

TELEPHONE (HOME) [REDACTED] (WORK) (415) 860-8955

CURRENT BOAT INFORMATION

POWER ☒ SAIL        LOA (Tip-to-Tip) 90' DRAFT 6-5'

NO BOAT BUT PLAN TO GET POWER        SAIL       

BERTH SIZE REQUESTED (Please check one size only; additional requests require additional application.)

25' 30' 35' 40' 45' 50' 60' 80' 90' ☒

I hereby request that my application for a berth at the San Francisco Marina Small Craft Harbor be accepted. I understand that the non-refundable \$75.00 (seventy five dollar) application will keep my name on the Wait List for one (1) year, and that I must renew no later than July 31 of each year to remain my placement on the Wait List. I understand and agree that an incomplete Wait List application form will be returned to me, and also that I must submit in writing any changes in my contact information.

New Application ☒

Renewal       

[Signature]  
Signature of Applicant

Please make checks payable to:

San Francisco Marina

Please return completed form to:

San Francisco Marina Wait List  
1950 Scott St  
San Francisco, CA 94123



Mayor Gavin Newsom  
General Manager Phillip A. Grunberg



Edwin M. Lee, Mayor  
Philip A. Ginsburg, General Manager

To: Honorable Members, Sunshine Ordinance Task Force

From: Olive Gang, Custodian of Records, Recreation and Park Department

Date: December 19, 2012

Subject: Dominic Maionchi v. Recreation and Park Department  
Complaint # 12058

We write in response to the complaint Dominic Maionchi filed on December 12, 2012 against the San Francisco Recreation and Park Department ("RPD"). In his complaint, Maionchi alleges that RPD violated (1) "Section 67.21b by not complying in 10 days with the request," (2) "Section 67.24e1," and (3) "Section 67.24L." His objection appears to lie with the fact that RPD redacted home addresses and home phone numbers from records it provided to him in response to his public records request.

The Task Force should dismiss Maionchi's complaint. As explained below, RPD's response to his public records request, including its redaction of private residence and telephone information, was lawful under the Sunshine Ordinance, the Public Records Act, and Article I, Section 1 of the California Constitution.

1. RPD Complied With Maionchi's Request Within 10 Days As Required By Section 67.21(b).

Because of high demand for the limited number of berths in the San Francisco Marina Small Craft Harbor ("the Marina"), RPD maintains a Wait List of applicants who wish to become berthholders in the Marina. The Wait List is divided into categories according to berth length. There is no limit to the number of berth size categories for which an applicant may register. As berths become available, they are offered to the applicant with greatest seniority on the Wait List for that berth's size. Applicants then have 15 days to accept or decline a berth assignment offer.

To apply for the Wait List, applicants must fill out a one-page "Wait List Application" form and pay a wait list application registration fee. Under the Marina Rules, the name of a natural person must appear on the application form; corporations, partnerships or business names are not accepted. (Marina Rules, Section 11(B)). To remain on the Wait List, each applicant must renew his/her registration every year by paying an additional registration fee and submitting a one-page Wait List Renewal Application form. (See S.F. Park Code § 12.11(f); Marina Rules, Section 11.)

On Thanksgiving Day, Thursday, November 22, 2012, at 5:18 p.m., Maionchi emailed a public records request to RPD. Because RPD was closed on Thursday and Friday in observance of the Thanksgiving holiday, RPD did not receive the request until Monday, November 26, 2012. In his request, Maionchi asked for "copies of the contracts for all people on the 90 foot wait list."

RPD responded to Maionchi's request on December 3, 2012, seven days after receiving it – well within the 10-day response time required by Section 67.21(b) of the Sunshine Ordinance. In response to the request, RPD emailed Maionchi electronic copies of the five Wait List Application forms for the persons on the Wait List who are seeking a 90-foot berth in the Marina. Attached as Exhibit A is a copy of the records RPD provided to Maionchi.

The Wait List applications Maionchi sought contain individuals' private residence and/or telephone information in addition to, or in lieu of, business address and telephone information. RPD redacted such personal information from the copies it provided Maionchi in order to protect the individual applicants' right to privacy. RPD did not redact the name of the individuals on such documents. Nor did RPD redact any business address or telephone information on such documents.

Upon receipt of the records, Maionchi emailed RPD objecting to the redaction of personal contact information from the application forms. On December 11, 2012, RPD responded to Maionchi's objections in writing, explaining again why RPD was redacting home addresses and phone numbers from the application forms and providing legal citations for those redactions.

## II. RPD Lawfully Redacted Private Residence Addresses and Telephone Information.

### 1. Neither the Sunshine Ordinance nor the Public Records Act Allows the City to Make Disclosures that Would Violate a Citizen's Right to Privacy.

RPD must comply with the Sunshine Ordinance, the Public Records Act, and the state and federal constitutions. The "Findings and Purpose" section of the Sunshine Ordinance makes clear that the Ordinance was not intended to eliminate or interfere with privacy rights. Specifically, Section 67.1(g) states that "[p]rivate entities and individuals and employees and officials of the City and County of San Francisco have rights to privacy that must be respected." The Public Records Act, likewise, was adopted by the Legislature in the spirit of being "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

Beyond these general principles, the Public Records Act specifically contains a privacy exemption, Section 6254(c), which covers "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). That exemption is retained in the Sunshine Ordinance, which states in relevant part that "[r]elease of documentary public information ... shall be governed by the California Public Records Act ... in particulars not addressed by this ordinance ...." S.F. Admin. Code § 67.21(k).

In addition, Section 6254(k) of the Public Records Act permits an agency to decline to disclose "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Cal. Gov't Code § 6254(k). Article I, Section 1 of the California Constitution, in turn, protects a citizen's right to privacy and classifies such a right as an "inalienable" right. That provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const., Art. I, § 1 (emphasis added).

Thus, RPD, as a City agency, may not make disclosures that violate an individual's right to privacy. The right to privacy is a third party right. It belongs not to the City, but to the individual. The City is obligated to protect and defend that right, which in this instance means retaining

from disclosing to Maionchi (or any other member of the public) the personal information RPD redacted from the Wait List applications provided to Maionchi in response to his public records request.

## **2. Individuals Have a Substantial Privacy Interest in Their Home Addresses and Home Telephone Numbers.**

Courts have repeatedly recognized that "individuals have a substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail." *City of San José v. Superior Court*, 74 Cal. App. 4th 1008, 1019 [1999]; see also *Loig v. Med. Bd.*, 78 Cal. App. 4th 482, 468 [2000] ("individuals have a substantial privacy interest in their home addresses"); *Sheet Metal Workers v. Dep't of Veteran Affairs*, 135 F.3d 891, 904 [3d Cir. 1998] (workers hired to help renovate a veterans hospital have a "significant" privacy interest in the nondisclosure of their home addresses).

In *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 494-501 (1994) ("Dep't of Defense"), the United States Supreme Court held that the home addresses of federal employees are exempt from disclosure to unions under the privacy exemption in the Freedom of Information Act (FOIA), which parallels Section 6254(c), the privacy exemption in the Public Records Act. The Court found that employees have a "privacy interest in nondisclosure" of their home address and "in avoiding the influx of [unsolicited] union-related mail ... telephone calls or visits, that would follow disclosure." *Id.* at 488. In so concluding, the Court observed that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id.* at p. 500-501.

Although home addresses and telephone numbers may be publicly available in varying degrees through telephone directories or similar services, that fact does not eliminate an individual's privacy interest in such information. See *Sheet Metal Workers* *int'l*, 135 F.3d at 905 (holding that employees have not "waived their privacy rights because their addresses are available from other public sources"). The U.S. Supreme Court has noted that the privacy interest encompasses an individual's control of information concerning his or her person and that "an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Dep't of Defense*, 510 U.S. at 500. Further, in light of the large number of individuals who have unlisted home phone numbers and who choose not to publicly disclose their home address in phone directories, it cannot be said that these categories of information have lost their private character in the modern world, as courts have recognized over and over again.

In this case, individuals who file applications for the Wait List for a berthing assignment in the Marina have provided that information to enable RPD's Harbormaster to contact them when necessary regarding their application. They have not given that information to the City for any other reason. By providing this information to RPD—as required by RPD—they have not consented, explicitly or implicitly, to the City's passing on that information to others. They retain their right to privacy in that information. They do not give up that precious right as a condition of applying for the Wait List for a berth at the Marina.

## **3. There is no Justification for Violating the Right to Privacy By Disclosing the Private Home Addresses and Phone Numbers of Wait List Applicants Because That Information is Unrelated to RPD's Performance of its Duties.**

An agency must decline to disclose information or records when the burden on the right to privacy outweighs the benefit to the public of the information contained in the files. *Braun v.*

*City of Taft*, 154 Cal. App. 3d 332, 345 (1984). In this case, public disclosure of the private home addresses and telephone numbers of Wait List applicants would violate the privacy rights of individuals seeking a berth assignment in the Marina, because there is no compelling justification in the public interest for such disclosure.

"In determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" *City of San Jose*, 74 Cal. App. 4th at 1019. Where disclosure of addresses would not serve this purpose, courts have regularly upheld the denial of the request for disclosure. See, e.g., *Dep't of Defense*, 510 U.S. at 502 ("privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure"); *Painting Industry of Hawaii v. Dept. of Air Force* (9th Cir. 1994) 26 F.3d 1479, 1486 (no disclosure of names and addresses on employee payroll because disclosure only marginally useful in uncovering "what the government is up to"); *Local 1274, Ill. Fed. of Teachers v. Niles* (Ill. App. 1997) 287 Ill. App. 3d 187, 193 (names and addresses of school district parents had "nothing to do with the duties of any public servant"); *Voinche v. F.B.I.* (D.D.C. 1996) 940 F. Supp. 323, 330 (workings of agencies not better understood by disclosure of identity of employees and private citizens who wrote to government officials). Courts have also recognized a distinction between the public disclosure of individuals' names as opposed to their home addresses and phone numbers. See, e.g., *Sonoma County Employees' Ret. Ass'n v. Superior Court*, 198 Cal. App. 4th 986, 1006 [2011] (while retired public employees' names and pension benefits must be disclosed, the court's ruling "will not result in the release of home addresses, telephone numbers, or e-mail addresses of retirees and beneficiaries"); *Int'l Fed'n of Prof'l & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 339 [2007] (while names and salaries of City employees must be disclosed, the "City has not been asked to disclose any contact information for these employees, such as home addresses or telephone numbers").

Here, the public interest in protecting individual privacy served by RPD's nondisclosure of private residence and phone information clearly outweighs the public interest—which, so far as we can tell, is nil—served by Majonchi's receipt of such information. RPD has made available all of the information on the Wait List applications, including applicants' names, except for applicants' home addresses and phone numbers. As in *City of San Jose*, "[i]t is not necessary to disclose the names, addresses, and telephone numbers of the [applicants] for the public to have access to vital information about City's performance of its [duty]." 74 Cal. App. 4th at 1012. Nor is disclosure of applicants' personal contact information "necessary to allow the public to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power." *Id.* at 1020. Because the applicants' home address information would not shed light on the agency's activities, the "relevant public interest supporting disclosure in this case is negligible, at best." *Dep't of Defense*, 510 U.S. at 497; see also *Painting Indus. of Hawaii*, 26 F.3d at 1486 ("employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering 'what the government is up to'"); *Local 1274, Ill. Fed. of Teachers*, 287 Ill. App. 3d at 193 (names and addresses of school district parents were not disclosed because disclosure had "nothing to do with the duties of any public servant"); *Sheet Metal Workers*, 135 F.3d at 903 ("The release of names, addresses, and similar 'private' information reveals little, if anything, about the operations of the Department of Veterans Affairs.")

Accordingly, RPD's redaction of personal addresses and telephone numbers is lawful. While the individuals whose Wait List applications are at issue here have a substantial privacy interest in nondisclosure of their home addresses and phone numbers, there is no legitimate

public interest served by mandating disclosure. Disclosure of the information will not promote openness in government nor will it shed light on RPD's performance of its duties. To the extent Maionchi or any other citizen is interested in the number and date of Wait List applications at the Marina, and/or the identity of the applicants, all such information is readily discernible from the documents RPD has provided to Maionchi.

### III. RPD's Redactions Do Not Violate Sunshine Ordinance Provisions Regarding Contracts.

Finally, Maionchi claims that the Wait List applications are "contracts" and therefore, he argues, Section 67.24(e)(1) of the Sunshine Ordinance mandates that the home address and phone numbers on the applications be disclosed. This argument appears to be based on a misunderstanding of the nature of the application forms and a misreading of Section 67.24(e)(1).

As an initial matter, the Wait List application forms that RPD provided Maionchi are not "contracts." A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." Black's Law Dictionary (9th ed. 2009). These records are applications that persons who wish to be placed on the Marina Wait List must fill out in order to be eligible for a berth if one becomes available. When a berth assignment becomes available, RPD then makes an offer to the person with the most seniority on the Wait List, and that person has 15 days to either accept or decline the offer. (Marina Rules, Section 11). Because the application forms do not create any enforceable obligations on the part of either RPD or the applicant, they are not contracts.

Even if these application forms could somehow be construed as "contracts," nothing in Section 67.24(e)(1) of the Sunshine Ordinance compels the City to disclose private residence or phone information that may be listed in a contract. That section simply states that contracts and bidding-related documents and communications "shall be open to inspection immediately after a contract has been awarded." This section ensures that citizens have access to relevant information about the City contracting process, such as the identity of contractors and bidders, the dollar amount of the contract, the scope of work of services to be provided under the contract, etc. RPD has made publicly available all of this information on the Wait List application form -- the names of the applicants, the date of the application, the size of the berth they are seeking, and so forth.

Of course, in the case of standard City contracts for goods and services, it is unlikely that a contractor would list his/her home address or home phone, rather than a business address or phone, in a contract. But citizens applying for berthing assignments in the Marina seek to use the berths for personal recreational use, not as part of a commercial enterprise. Indeed, commercial activity is generally prohibited in the Marina, and the Marina Rules explicitly state that "[t]he name of only one natural person may appear on the application. Corporations, partnerships or business names will not be accepted." (Marina Rules, Section 11(B)). As a result, applicants most often supply RPD with their home addresses and home phone numbers as the point of contact because they do not have commercial addresses or phone numbers that pertain to rental of the berth. By doing so, these citizens do not waive their privacy rights in the confidentiality of their home addresses.

In light of the extensive case law recognizing individuals' substantial privacy interest in their home addresses and phone numbers, the absence of a compelling reason to justify disclosure of this private information on the Wait List application forms, and the absence of any affirmative waiver of their privacy rights on the part of the Wait List applicants, RPD lawfully redacted the personal contact information on the application forms. Accordingly, RPD respectfully requests that the Task Force dismiss Complaint # 12058.

Thank you for your time and consideration.

*Olive Gong*

Olive Gong  
Custodian of Records

Attachments: Exhibit A

## Ausberry, Andrea

---

From: Ausberry, Andrea  
Sent: Wednesday, December 12, 2012 3:16 PM  
To: Gong, Olive; 'dm567@pacbell.net'  
Cc: 'Jerry.Threet@sfgov.org'; Grant, Kitt (sunshinechairgrant@gmail.com)  
Subject: Mediation - SOTF Complaint 12058  
Attachments: 12058 Complaint.pdf

Good Afternoon,

This e-mail is notification that the following complaint has been received from Dominic Maionchi against the Recreation and Park Department. In an attempt to mediate and stave off a hearing before the Sunshine Ordinance Task Force, please respond to the following request within five business days.

The Complainant is requesting: PLEASE SEE ATTACHED REQUEST

Pursuant to Section 67.21(b), If the custodian of public records believes the record or information requested is not a public record or is exempt, the custodian shall justify withholding any record by demonstrating, in writing as soon as possible and within ten days following receipt of a request, that the record in question is exempt under express provisions of the Sunshine Ordinance.

Thank you,

Andrea S. Ausberry  
Administrator  
Sunshine Ordinance Task Force  
Office 415-554-7724 | Fax 415-554-5163  
[sotf@sfgov.org](mailto:sotf@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)  
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244  
San Francisco, CA 94102  
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## SOTF

---

**From:** SOTF  
**Sent:** Wednesday, January 30, 2013 8:43 AM  
**To:** 'dm567@pacbell.net'; Gong, Olive  
**Cc:** Threet, Jerry; 'kitt grant'; 'loufischerSOTF@gmail.com'  
**Subject:** Sunshine Complaint Received: Case No. 12058 Dominic Maionchi v Recreation and Park  
**Attachments:** 1\_Complaint Procedures\_4-28-09\_Final.pdf; 12058.Complaint.pdf; 12058 Respondents response.pdf; 12058 Respondents Response Exhibit A.pdf

Good Afternoon,

This e-mail is to confirm that the attached/following complaint and support document(s) was received and went through the mediation process without resolve and will proceed to be heard by the Sunshine Ordinance Task Force. **If the Respondent did not submit a written response during mediation, please do so as it is required to submit a written response to the allegations including any and all supporting documents, recordings, electronic media, etc., to the Task Force within five (5) business days of receipt of this notice.** This is your opportunity to provide a full explanation with enough advance time so that the Task Force may be fully informed in considering your response prior to the meeting. Please refer to **Complaint No. 12058** when submitting any new information and/or supporting documents pertaining to this complaint.

The Sunshine Ordinance Task Force was suspended during the months of June 6, 2012 through November 6, 2012 from hearing complaints, due to it being constituted in violation of Section 67.30 of the Ordinance: "At all times the Task Force shall include at least one member who shall be a member of the public who is physically handicapped and who has demonstrated interest in citizen access and participation in local government."

Therefore, due to the backlog and complaints heard according to chronological submission both parties (Complainant and Respondent) will be contacted once a hearing date is determined.

**Complainants:** Your attendance is required at this meeting/hearing.

**Respondents/Departments:** Pursuant to Section 67.21 (e) of the Ordinance, attendance by the custodian of records or a representative of your department, who can speak to the matter, is required at the meeting/hearing.

Also, attached is the Sunshine Ordinance Task Force's complaint procedures.

Thank you,

Andrea S. Ausberry  
Administrator  
Sunshine Ordinance Task Force  
Office 415.554.7724 | Fax 415.554.5163  
[sotf@sfgov.org](mailto:sotf@sfgov.org) | [www.sfbos.org](http://www.sfbos.org)  
City Hall, 1 Dr. Carlton B. Goodlett Place, Rm. 244  
San Francisco, CA 94102  
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# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

## EXECUTIVE DIRECTOR'S REPORT TO THE SAN FRANCISCO ETHICS COMMISSION For the Regular Meeting of April 28, 2014

BENEDICT Y. HUR  
CHAIRPERSON

PAUL A. RENNE  
VICE-CHAIRPERSON

BRETT ANDREWS  
COMMISSIONER

BEVERLY HAYON  
COMMISSIONER

PETER KEANE  
COMMISSIONER

JOHN ST. CROIX  
EXECUTIVE DIRECTOR

### 1. Budget/Staffing.

We have chosen an applicant to fill the vacant auditor position. The appointment will be final when all requirements for Human Resources processing have been completed.

### 2. Investigation and enforcement program.

As of April 17, 2014, there were 23 pending formal complaints alleging violations within the Ethics Commission's jurisdiction.

Category	# of Complaints
Campaign Finance	16
Conflict of Interest	2
Governmental Ethics	0
Lobbyist Ordinance	0
Campaign Consultant Ordinance	2
Sunshine Ordinance	3
<b>TOTAL</b>	<b>23</b>

### 3. Campaign finance disclosure program.

a. Filing deadline. The most recent filing deadline was on January 31, 2014 for the First Semi Annual statement, which covers the reporting period ending December 31, 2013. Of the 183 committees required to file on this deadline, only two have not yet filed and staff is pursuing those entities (one is an office holder and one is a general purpose committee). The next filing deadline is March 24, 2014 for the First Pre-Election statement, which covers the reporting period ending March 17, 2014.

Due to recent changes to the Campaign Finance Reform Ordinance and Ethics Commission regulations, all committees must now file electronic statements and complete the electronic signature requirements. Staff has informed treasurers and candidates about the new requirements and has provided detailed instructions. Staff continues to inform and assist committees during this transition.

b. Collection of late filing fees and contribution forfeitures. In the FY 13-14, as of March 31, the Commission collected a total of \$13,736 in campaign finance late fees and forfeitures. Outstanding late fees and forfeitures total \$18,870, of which \$13,260 is pending at the Bureau of Delinquent Revenues (BDR).

c. Status of accounts to San Francisco Bureau of Delinquent Revenues (BDR). The following chart provides details on active accounts referred to BDR as of January 31, 2014:

#	Committee/ Filer	ID #	Treasurer or Responsible Officer	Date referral effective	Original amount referred	Last month's balance	Current balance (Changes are in <b>bold</b> )
1	Johnny K. Wang JKW Political Consulting	100716	Johnny K. Wang	4/19/11	\$4,000	\$4,000	\$4,000
2	Coalition to Elect Chris Jackson to Community College Board	1302351	Chris Jackson	6/17/11	\$2,658.90	\$2,658.90	2,658.90
3	Chris Jackson For Community College Board	1347066	Chris Jackson	7/12/13	\$6,600.94	\$6,600.94	\$6,600.94
						<b>TOTAL</b>	<b>\$13,260</b>

#### 4. Revenues report.

For FY 13-14, the Commission is budgeted to generate \$100,000 in revenues. As of April 17, 2014, the Commission received \$82,159 as summarized below. The figure represents collection of approximately 82 percent of expected revenues for FY 13-14, 80 percent of the fiscal year having elapsed.

Revenues received as of April 17, 2014:

Source	Budgeted Amount FY 13-14	Receipts
Lobbyist Fees	\$27,000	\$57,500
Other Ethics General	\$1,000	\$12
Campaign Finance Fines	\$50,000	\$13,174
Campaign Consultant Fees	\$18,000	\$5,100
Lobbyist Fines	\$1,000	\$200
Statements of Economic Interests Fines	\$1,000	\$1,410
Other Ethics Fines	\$1,000	\$4,713
Campaign Consultant Fines	\$1,000	\$50
Unallocated	\$0	\$0
Total	\$100,000	\$82,159

#### 5. Lobbyist program.

As of April 17, 2014, 100 individual lobbyists were registered with the Commission. Total revenues collected to date for the 2013-2014 fiscal year amount to \$57,700, with \$57,500 in lobbyist registration fees and \$200 in fines. The filing deadline for the next lobbyist disclosure statement is May 15, 2014.

#### **6. Campaign Consultant program.**

As of April 18, 2014, 21 campaign consultants were registered with the Commission. \$6,100 in registration fees and fines and have been collected so far during the 2013-2014 fiscal year. The next campaign consultant quarterly report deadline is Monday, June 16, 2014, covering the reporting period from March 1, 2014 through May 31, 2014. Staff will send reminders to all active campaign consultants before the deadline.

#### **7. Statements of Economic Interests.**

Four hundred seventy-two (472) City officers, department heads and commissioners filed their annual Form 700s electronically using the NetFile system by the April 1 deadline. (An additional 13 individuals filed as of April 21st.) This resulted in an on-time filing rate of 91 percent, which represents an increase of 2 percent from last year. The total number of individuals filing with the Commission this year also increased to 517 from last year's number of 488.

While a few found filing online to be a challenge, most filers were able to successfully file their electronic Form 700 without assistance.

Thirty-one (31) individuals have not yet filed their Form 700s; they will be e-mailed reminders. Individuals who fail to file after receiving the e-mailed reminder will receive a written notification of delinquency from the Commission in early May and, if needed, another in early June. Individuals who fail to respond after the second notification will be referred to the Fair Political Practices Commission for enforcement in early July, 2014.

#### **8. Outreach and Education.**

On April 17, 2014, an educational meeting was held with a delegation from the Liaoning Province (in Northeast China).

The Commission continues to offer trainings on Statements of Incompatible Activities to City departments via web trainings. The following are web video trainings available on the Commission website:

- Department of Building Inspection SIA Training
- Candidates' Training
- Controller's Office SIA Training
- Department on the Environment SIA Training
- Governmental Ethics Ordinance Training for City Employees
- Lobbyist Ordinance Training
- Medical Examiner's Office SIA Training
- Non-Candidate Recipient Committee Training
- Public Utilities Commission SIA Training
- SIA Template Language Training

Respectfully submitted,



John St. Croix  
Executive Director

S:\ED Report\2014\4.28.2014.docx

Minutes of the Regular Meeting of  
The San Francisco Ethics Commission  
April 28, 2014  
Room 400, City Hall  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102

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DOCUMENTS DEPT

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**I. Call to order and roll call.**

Chairperson Hur called the meeting to order at 5:32 PM.

COMMISSION MEMBERS PRESENT: Benedict Y. Hur, Chairperson; Paul Renne, Vice-Chairperson; Brett Andrews, Commissioner; Beverly Hayon, Commissioner; Peter Keane, Commissioner.

STAFF PRESENT: John St. Croix, Executive Director; Jesse Mainardi, Deputy Executive Director; Garrett Chatfield, Investigator/Legal Analyst.

OFFICE OF THE CITY ATTORNEY: Josh White, Deputy City Attorney (DCA).

OTHERS PRESENT: Sarah Ballard, John Moren, Ray Hartz, and David Pilpel.

MATERIALS DISTRIBUTED:

**II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.**

Ray Hartz stated that he went to Florida in March and was surprised his hearing on a Sunshine Ordinance Task Force referral was scheduled to be heard by the Ethics Commission in March. He stated that he was out of town when the notice was sent and when the hearing was held. He stated that the scheduling of his complaint was purposefully done so he would not be at the hearing.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

On March 24 this commission held a hearing on a case to which I was a party. I think you can imagine my reaction when on March 26 I first became aware of this series of events! On further consideration, I realized that I was altogether pleased that this occurred. It allowed the other party to the case, City Librarian Luis Herrera, to do what he does so exquisitely: lie through his teeth! Commissioner Andrews raised the question as to whether Mr. Herrera had looked at a way to comply without spending \$40,000. Simple, take the two Microsoft PowerPoint slides just as they would for presenters they quote "invited." Commissioner Keane was exactly on point, this is a free speech issue! If he is going to discuss that matter, he might want to point out the level of scrutiny applied to political free speech. It's a pretty high bar!

Commissioner Hur stated that the Commission was unaware that Mr. Hartz was out of town when the notice was sent and hearing scheduled.

**III. Discussion and possible action on a matter submitted under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance. Ethics Complaint No. 03-140303, hearing regarding alleged willful violation of the Sunshine Ordinance by**

**a department head (Sunshine Ordinance Task Force Complaint 12058, referred to the Ethics Commission on March 3, 2014): Complainant, Dominic Maionchi; Respondent Phil Ginsburg.**

Commissioner Hur asked the parties to identify themselves. The Complainant was not present, the Respondent was represented by Sarah Ballard.

Ms. Ballard, representing Recreation and Park General Manager Phil Ginsburg, stated that she agreed with the Report and Recommendation finding that Mr. Ginsburg was not a properly named Respondent by the Task Force. She also stated that the home addresses and phone numbers on the documents at issue were properly redacted based on individuals' privacy rights.

Commissioner Keane asked Ms. Ballard to identify an express provision of law under the California Records Act or Sunshine Ordinance that allowed for the redactions of home address and phone information. Ms. Ballard responded stating that the California constitutional right to privacy allows for the redaction of private information. Commissioner Keane and Ms. Ballard exchanged questions and answers regarding the government's burden under state law when determining to withhold private information.

Ms. Ballard responded to a question from Commissioner Renne regarding why confidentiality should attach to the names of applicants who request a berth from the department by stating that the names of all applicants are released and are public information, and that the department only redacts the home address and phone number of each applicant.

John Moren, Harbor Master for the department, stated that berth holders expect that their home phone number is not public information that can be released by the department.

In response to Commissioner Keane, Ms. Ballard stated that the general advice provided to City departments by the City Attorney's Office is that home addresses and home phone numbers of private citizens is private information and is not to be disclosed by a department as part of public records request.

DCA White stated that the language promulgated through a long line of California case law and by the California Supreme Court is that when government is balancing the interests between the public's right to information against an individual's right to privacy, releasing private information is warranted if it sheds light on the government agency's legislative duties.

Responding to Chairperson Hur, Ms. Ballard stated that the department follows the general rule provided for by the City Attorney's Office, and does apply a balancing test on a case by case basis. She stated that in this matter, the department responded to the records request in the context of an allegation that an illegal berth transfer had occurred. She stated that the department had factored into its balancing test that if the department had not been engaged in an active investigation regarding the berth transfer, it might have released the home address and phone number of the applicants.

Commissioner Keane stated that the City Attorney's advice provided in the Good Government Guide is advisory with no force of law. He stated that section 67.26 of the Sunshine Ordinance states that any exemption must be based on an express exemption provided for by law.

Deputy Executive Director Mainardi stated that San Francisco Administrative Code, Chapter 12M, does provide a specific exemption that allows the City to withhold private information.

Public Comment:

David Pilpel stated that the Report and Recommendation clearly outlines the two issues on which the Commission needs to make a determination, although he disagrees with the conclusion. He stated that the information should have been released, but does not think it was wilfully withheld. He stated that he did not think Mr. Ginsburg was the correctly named party.

Ray Hartz stated that the City Attorney doesn't want to bite the hand that feeds him. He further stated that he had requested anonymity in another matter and the City Attorney released his name.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

George Orwell said: "In a time of deceit, telling the truth is a revolutionary act." From gavel to gavel each meeting of this Ethics Commission is becoming, in fact, a "time of deceit!" Questioning why a department head in the city should be held accountable for the actions and/or inactions of those under his direction and control is without logical basis. When a department head accepts a position, takes an oath, and accepts a salary they have a responsibility to the citizens of San Francisco. Do you believe Mr. Ginsberg [sic] wasn't informed regarding this matter? Do you believe Mr. Ginsberg [sic] didn't purposefully avoid attending the hearing in the matter? To now say that Mr. Ginsberg [sic] was unaware of this matter is something only a complete idiot would say! Again, we have a case where John St. Croix will use a missing punctuation mark to thwart the will of San Franciscans.

Responding to a question from Chairperson Hur, David Pilpel stated that case law regarding the applicability of balancing privacy interests against the public's right to know is not on point. He further stated that although San Francisco Administrative Code, Chapter 12M is a specific exemption providing for the withholding of private information, Sunshine Ordinance, section 67.36, states that the Sunshine Ordinance supersedes all other local law.

Commissioner Keane stated that the record in this matter demonstrates that the redaction of private citizens' home addresses and phone numbers was improper and that information should have been disclosed by the department. He stated that no express provision was cited that exempts the redacted information from being released. He further stated that the home addresses and phone numbers, in this case, do not rise to the level of a fundamental right to privacy. He stated that the Ethics Commission should find a non-willful violation of the Sunshine Ordinance because the information was redacted in good faith reliance on the City Attorney's advice, and that the redacted information should be released to the complainant.

Responding to Commissioner Andrews regarding the legality of releasing private information, DCA White stated that a court would look at California state law to determine if the information was properly released by considering all the factors, factual and legal, involved in this matter. He further stated that under California law, the individual is the holder of private information, not the government agency who happens to obtain that information.

Chairperson Hur and Commissioner Keane both stated that the Ethics Commission cannot weigh into its decision the potential of litigation for ordering the release of home address and phone information in this case.

Commissioner Keane stated that the Ethics Commission could make a finding that the department violated the Sunshine Ordinance without finding Mr. Ginsburg was responsible.

DCA White stated that the Ethics Commission must make a finding against an individual.

Ray Hartz stated that the department head is responsible for the whole department. He stated that David Pilpel is a Task Force member and that he often undercuts decisions made by the Task Force. Mr. Hartz stated that he questioned if staff properly noticed the complainant in this matter.

The Commissioners engaged in a discussion regarding the appropriateness of Mr. Ginsburg being the named respondent in this matter based on the information provided in the record.

**Motion 14-04-28-01 (Keane/Renne) Moved, seconded and failed (2-3; Hur, Andrews, and Hayon dissenting) that the Sunshine Ordinance was violated by Mr. Ginsburg as the head of the Recreation and Park Department and that the violation was non-wilful, and that the information withheld in this matter should be disclosed.**

Commissioner Hayon stated that the average citizen does not expect that a government agency is going to release their private home address and phone number to a member of the public making a public records request. She stated that the Sunshine Ordinance Task Force is not concerned with protecting the privacy of citizens.

**Motion 14-04-28-02 (Andrews/Hur) Moved, seconded and passed (3-2, Hayon and Keane dissenting) that the Ethics Commission refer the matter back to the Sunshine Ordinance Task Force for more factual information.**

**IV. Closed Session. Closed session held pursuant to Brown Act, section 54956.9(a), (c)(2), and Sunshine Ordinance, section 67.10(d), to discuss anticipated litigation as defendant in light of *McCutcheon v. Federal Election Commission*, No. 12-536.**

**Motion 14-04-28-03 (Renne/Hayon) Moved, seconded and passed (5-0) that the Ethics Commission move into closed session.**

Public Comment:

Ray Hartz stated that it is improper for the Commission to go into closed session because the item, as worded in the Agenda, does not provide sufficient information for a person of average intelligence to know what the item is about.

The Ethics Commission went into closed session at 7:45 PM. Sarah Ballard, John Moren, Ray Hartz, and David Pilpel left the hearing room. The Commission members, Executive Director St. Croix, Deputy Executive Director Mainardi, Commission staff member Garrett Chatfield, and DCA White remained in the hearing room during closed session.

The Ethics Commission returned to open session at 8:00 PM. Ray Hartz and David Pilpel returned to the hearing room.

**Motion 14-04-28-04 (Keane/Hayon) Moved, seconded and passed (5-0) that the Ethics Commission disclose part of its closed session discussion in which it resolved to discuss and possibly take action on the best policy response to the United States Supreme Court's decision in *McCutcheon v. Federal Election Commission*, No. 12-536, at the Commission's next meeting.**

Public Comment:

Ray Hartz stated that this is the first time in his experience that the Ethics Commission has disclosed any part of its closed session discussion.

**V. Discussion and possible action on the minutes of the Commission's meeting of March 24, 2014.**

No discussion

Public Comment:

Ray Hartz stated that he supported the approval of the minutes.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

I wholeheartedly support the approval of these minutes! It documents the efforts of Commissioner Andrews and Commissioner Keane to openly and honestly discuss my case before this commission. It documents, as a matter of public record, the pattern of deceit used by City Librarian Luis Herrera. It documents the "willful ignorance" exhibited by commissioners [sic] Renne and Hayon. Renne is quite disingenuous in his questioning why Herrera should be held responsible. Herrera is the department head and nothing happens at the library without his approval! Hayon participates in the hearing, siding with Herrera, the Library Commission, and "The Friends!" Then prior to the vote, she exhibits concern about a "conflict of interest." As a former library commissioner, she intentionally participated in the hearing, siding with the library, clearly exhibiting that conflict of interest! I would suggest they both get/read "*The Ethics of Willful Ignorance*," by law professor Rebecca Roiphe.

David Pilpel suggested several changes to make the minutes read more clearly.

**Motion 14-04-28-05 (Keane/Andrews) Moved, seconded and passed (5-0) to approve the minutes with Mr. Pilpel's suggested changes.**

**VI. Discussion of Executive Director's Report.**

Executive Director St. Croix highlighted the successful implementation of electronic Statement of Economic Interests filings.

Commissioner Keane stated that he confirmed that his Statement of Economic Interests was not due to be filed until next year's filing deadline.

Commissioner Andrews asked Executive Director St. Croix on the status of delinquent revenue accounts. Executive Director St. Croix provided that information.

Public Comment:

Ray Hartz stated that the monthly Executive Director's report is just a form. He stated that Executive Director St. Croix abuses his position to deprive citizens' of their rights.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

I have decided, without a doubt, the Executive Director of this commission, John St. Croix, is an apparatchik! That is a Russian colloquial term for a full-time, professional functionary of the government, i.e. an agent of the government or party apparatus that held any position of

bureaucratic or political responsibility. St. Croix has no compunction whatsoever in abusing his position to deprive the citizens of San Francisco of their rights to participate in city government. He will do everything within his power to protect both elected and appointed officials from responsibility for their actions and/or inactions. I find it truly deplorable that this Ethics Commission will rely, without question, upon the recommendations of the staff, when those recommendations are knowingly and willfully tailored to deny justice! I do not truly believe that the staff is responsible, but, is wholly and totally at the mercy of St. Croix. A damned bureaucrat!

David Pilpel stated that the pending lawsuit against the Commission filed by Allen Grossman is due for oral argument soon.

#### **VII. Items for future meetings.**

Commissioner Keane requested a future item be put on the Agenda to discuss the status of the Grossman lawsuit.

Chairperson Hur stated that any discussion of pending litigation would have to occur in closed session. DCA White agreed with Commissioner Hur.

#### Public Comment:

David Pilpel stated that the Sunshine Ordinance Task Force procedure needs to be addressed.

Ray Hartz stated that the Commission should not hear a matter if a party does not appear. He stated that he informed the Sunshine Ordinance Task Force that he was going to be out of town in March, yet the Ethics Commission calendared his hearing while he was out of town.

#### **VIII. Adjournment.**

**Motion 14-04-28-06 (Renne/Hayon) Moved, seconded and passed (5-0) that the Ethics Commission adjourn.**

The meeting adjourned at 8:24 PM.

Minutes of the Regular Meeting of  
The San Francisco Ethics Commission  
April 28, 2014  
Room 400, City Hall  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102

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**I. Call to order and roll call.**

Chairperson Hur called the meeting to order at 5:32 PM.

COMMISSION MEMBERS PRESENT: Benedict Y. Hur, Chairperson; Paul Renne, Vice-Chairperson; Brett Andrews, Commissioner; Beverly Hayon, Commissioner; Peter Keane, Commissioner.

STAFF PRESENT: John St. Croix, Executive Director; Jesse Mainardi, Deputy Executive Director; Garrett Chatfield, Investigator/Legal Analyst.

OFFICE OF THE CITY ATTORNEY: Josh White, Deputy City Attorney (DCA).

OTHERS PRESENT: Sarah Ballard, John Moren, Ray Hartz, and David Pilpel.

MATERIALS DISTRIBUTED:

**II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.**

Ray Hartz stated that he went to Florida in March and was surprised his hearing on a Sunshine Ordinance Task Force referral was scheduled to be heard by the Ethics Commission in March. He stated that he was out of town when the notice was sent and when the hearing was held. He stated that the scheduling of his complaint was purposefully done so he would not be at the hearing.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

On March 24 this commission held a hearing on a case to which I was a party. I think you can imagine my reaction when on March 26 I first became aware of this series of events! On further consideration, I realized that I was altogether pleased that this occurred. It allowed the other party to the case, City Librarian Luis Herrera, to do what he does so exquisitely: lie through his teeth! Commissioner Andrews raised the question as to whether Mr. Herrera had looked at a way to comply without spending \$40,000. Simple, take the two Microsoft PowerPoint slides just as they would for presenters they quote "invited." Commissioner Keane was exactly on point, this is a free speech issue! If he is going to discuss that matter, he might want to point out the level of scrutiny applied to political free speech. It's a pretty high bar!

Commissioner Hur stated that the Commission was unaware that Mr. Hartz was out of town when the notice was sent and hearing scheduled.

**III. Discussion and possible action on a matter submitted under Chapter Three of the Ethics Commission Regulations for Violations of the Sunshine Ordinance. Ethics Complaint No. 03-140303, hearing regarding alleged willful violation of the Sunshine Ordinance by**



**a department head (Sunshine Ordinance Task Force Complaint 12058, referred to the Ethics Commission on March 3, 2014): Complainant, Dominic Maionchi; Respondent Phil Ginsburg.**

Commissioner Hur asked the parties to identify themselves. The Complainant was not present, the Respondent was represented by Sarah Ballard.

Ms. Ballard, representing Recreation and Park General Manager Phil Ginsburg, stated that she agreed with the Report and Recommendation finding that Mr. Ginsburg was not a properly named Respondent by the Task Force. She also stated that the home addresses and phone numbers on the documents at issue were properly redacted based on individuals' privacy rights.

Commissioner Keane asked Ms. Ballard to identify an express provision of law under the California Records Act or Sunshine Ordinance that allowed for the redactions of home address and phone information. Ms. Ballard responded stating that the California constitutional right to privacy allows for the redaction of private information. Commissioner Keane and Ms. Ballard exchanged questions and answers regarding the government's burden under state law when determining to withhold private information.

Ms. Ballard responded to a question from Commissioner Renne regarding why confidentiality should attach to the names of applicants who request a berth from the department by stating that the names of all applicants are released and are public information, and that the department only redacts the home address and phone number of each applicant.

John Moren, Harbor Master for the department, stated that berth holders expect that their home phone number is not public information that can be released by the department.

In response to Commissioner Keane, Ms. Ballard stated that the general advice provided to City departments by the City Attorney's Office is that home addresses and home phone numbers of private citizens is private information and is not to be disclosed by a department as part of public records request.

DCA White stated that the language promulgated through a long line of California case law and by the California Supreme Court is that when government is balancing the interests between the public's right to information against an individual's right to privacy, releasing private information is warranted if it sheds light on the government agency's legislative duties.

Responding to Chairperson Hur, Ms. Ballard stated that the department follows the general rule provided for by the City Attorney's Office, and does apply a balancing test on a case by case basis. She stated that in this matter, the department responded to the records request in the context of an allegation that an illegal berth transfer had occurred. She stated that the department had factored into its balancing test that if the department had not been engaged in an active investigation regarding the berth transfer, it might have released the home address and phone number of the applicants.

Commissioner Keane stated that the City Attorney's advice provided in the Good Government Guide is advisory with no force of law. He stated that section 67.26 of the Sunshine Ordinance states that any exemption must be based on an express exemption provided for by law.

Deputy Executive Director Mainardi stated that San Francisco Administrative Code, Chapter 12M, does provide a specific exemption that allows the City to withhold private information.

Public Comment:



David Pilpel stated that the Report and Recommendation clearly outlines the two issues on which the Commission needs to make a determination, although he disagrees with the conclusion. He stated that the information should have been released, but does not think it was wilfully withheld. He stated that he did not think Mr. Ginsburg was the correctly named party.

Ray Hartz stated that the City Attorney doesn't want to bite the hand that feeds him. He further stated that he had requested anonymity in another matter and the City Attorney released his name.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

George Orwell said: "In a time of deceit, telling the truth is a revolutionary act." From gavel to gavel each meeting of this Ethics Commission is becoming, in fact, a "time of deceit!" Questioning why a department head in the city should be held accountable for the actions and/or inactions of those under his direction and control is without logical basis. When a department head accepts a position, takes an oath, and accepts a salary they have a responsibility to the citizens of San Francisco. Do you believe Mr. Ginsberg [sic] wasn't informed regarding this matter? Do you believe Mr. Ginsberg [sic] didn't purposefully avoid attending the hearing in the matter? To now say that Mr. Ginsberg [sic] was unaware of this matter is something only a complete idiot would say! Again, we have a case where John St. Croix will use a missing punctuation mark to thwart the will of San Franciscans.

Responding to a question from Chairperson Hur, David Pilpel stated that case law regarding the applicability of balancing privacy interests against the public's right to know is not on point. He further stated that although San Francisco Administrative Code, Chapter 12M is a specific exemption providing for the withholding of private information, Sunshine Ordinance, section 67.36, states that the Sunshine Ordinance supersedes all other local law.

Commissioner Keane stated that the record in this matter demonstrates that the redaction of private citizens' home addresses and phone numbers was improper and that information should have been disclosed by the department. He stated that no express provision was cited that exempts the redacted information from being released. He further stated that the home addresses and phone numbers, in this case, do not rise to the level of a fundamental right to privacy. He stated that the Ethics Commission should find a non-willful violation of the Sunshine Ordinance because the information was redacted in good faith reliance on the City Attorney's advice, and that the redacted information should be released to the complainant.

Responding to Commissioner Andrews regarding the legality of releasing private information, DCA White stated that a court would look at California state law to determine if the information was properly released by considering all the factors, factual and legal, involved in this matter. He further stated that under California law, the individual is the holder of private information, not the government agency who happens to obtain that information.

Chairperson Hur and Commissioner Keane both stated that the Ethics Commission cannot weigh into its decision the potential of litigation for ordering the release of home address and phone information in this case.

Commissioner Keane stated that the Ethics Commission could make a finding that the department violated the Sunshine Ordinance without finding Mr. Ginsburg was responsible.



DCA White stated that the Ethics Commission must make a finding against an individual.

Ray Hartz stated that the department head is responsible for the whole department. He stated that David Pilpel is a Task Force member and that he often undercuts decisions made by the Task Force. Mr. Hartz stated that he questioned if staff properly noticed the complainant in this matter.

The Commissioners engaged in a discussion regarding the appropriateness of Mr. Ginsburg being the named respondent in this matter based on the information provided in the record.

**Motion 14-04-28-01 (Keane/Renne) Moved, seconded and failed (2-3; Hur, Andrews, and Hayon dissenting) that the Sunshine Ordinance was violated by Mr. Ginsburg as the head of the Recreation and Park Department and that the violation was non-wilful, and that the information withheld in this matter should be disclosed.**

Commissioner Hayon stated that the average citizen does not expect that a government agency is going to release their private home address and phone number to a member of the public making a public records request. She stated that the Sunshine Ordinance Task Force is not concerned with protecting the privacy of citizens.

**Motion 14-04-28-02 (Andrews/Hur) Moved, seconded and passed (3-2, Hayon and Keane dissenting) that the Ethics Commission refer the matter back to the Sunshine Ordinance Task Force for more factual information.**

- IV. Closed Session. Closed session held pursuant to Brown Act, section 54956.9(a), (e)(2), and Sunshine Ordinance, section 67.10(d), to discuss anticipated litigation as defendant in light of *McCutcheon v. Federal Election Commission*, No. 12-536.

**Motion 14-04-28-03 (Renne/Hayon) Moved, seconded and passed (5-0) that the Ethics Commission move into closed session.**

Public Comment:

Ray Hartz stated that it is improper for the Commission to go into closed session because the item, as worded in the Agenda, does not provide sufficient information for a person of average intelligence to know what the item is about.

The Ethics Commission went into closed session at 7:45 PM. Sarah Ballard, John Moren, Ray Hartz, and David Pilpel left the hearing room. The Commission members, Executive Director St. Croix, Deputy Executive Director Mainardi, Commission staff member Garrett Chatfield, and DCA White remained in the hearing room during closed session.

The Ethics Commission returned to open session at 8:00 PM. Ray Hartz and David Pilpel returned to the hearing room.

**Motion 14-04-28-04 (Keane/Hayon) Moved, seconded and passed (5-0) that the Ethics Commission disclose part of its closed session discussion in which it resolved to discuss and possibly take action on the best policy response to the United States Supreme Court's decision in *McCutcheon v. Federal Election Commission*, No. 12-536, at the Commission's next meeting.**

Public Comment:

Ray Hartz stated that this is the first time in his experience that the Ethics Commission has disclosed any part of its closed session discussion.



**V. Discussion and possible action on the minutes of the Commission's meeting of March 24, 2014.**

No discussion

Public Comment:

Ray Hartz stated that he supported the approval of the minutes.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

I wholeheartedly support the approval of these minutes! It documents the efforts of Commissioner Andrews and Commissioner Keane to openly and honestly discuss my case before this commission. It documents, as a matter of public record, the pattern of deceit used by City Librarian Luis Herrera. It documents the "willful ignorance" exhibited by commissioners [sic] Renne and Hayon. Renne is quite disingenuous in his questioning why Herrera should be held responsible. Herrera is the department head and nothing happens at the library without his approval! Hayon participates in the hearing, siding with Herrera, the Library Commission, and "The Friends!" Then prior to the vote, she exhibits concern about a "conflict of interest." As a former library commissioner, she intentionally participated in the hearing, siding with the library, clearly exhibiting that conflict of interest! I would suggest they both get/read "*The Ethics of Willful Ignorance*," by law professor Rebecca Roiphe.

David Pilpel suggested several changes to make the minutes read more clearly.

**Motion 14-04-28-05 (Keane/Andrews) Moved, seconded and passed (5-0) to approve the minutes with Mr. Pilpel's suggested changes.**

**VI. Discussion of Executive Director's Report.**

Executive Director St. Croix highlighted the successful implementation of electronic Statement of Economic Interests filings.

Commissioner Keane stated that he confirmed that his Statement of Economic Interests was not due to be filed until next year's filing deadline.

Commissioner Andrews asked Executive Director St. Croix on the status of delinquent revenue accounts. Executive Director St. Croix provided that information.

Public Comment:

Ray Hartz stated that the monthly Executive Director's report is just a form. He stated that Executive Director St. Croix abuses his position to deprive citizens' of their rights.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

I have decided, without a doubt, the Executive Director of this commission, John St. Croix, is an apparatchik! That is a Russian colloquial term for a full-time, professional functionary of the government, i.e. an agent of the government or party apparatus that held any position of



bureaucratic or political responsibility. St. Croix has no compunction whatsoever in abusing his position to deprive the citizens of San Francisco of their rights to participate in city government. He will do everything within his power to protect both elected and appointed officials from responsibility for their actions and/or inactions. I find it truly deplorable that this Ethics Commission will rely, without question, upon the recommendations of the staff, when those recommendations are knowingly and willfully tailored to deny justice! I do not truly believe that the staff is responsible, but, is wholly and totally at the mercy of St. Croix. A damned bureaucrat!

David Pilpel stated that the pending lawsuit against the Commission filed by Allen Grossman is due for oral argument soon.

#### **VII. Items for future meetings.**

Commissioner Keane requested a future item be put on the Agenda to discuss the status of the Grossman lawsuit.

Chairperson Hur stated that any discussion of pending litigation would have to occur in closed session. DCA White agreed with Commissioner Hur.

#### Public Comment:

David Pilpel stated that the Sunshine Ordinance Task Force procedure needs to be addressed.

Ray Hartz stated that the Commission should not hear a matter if a party does not appear. He stated that he informed the Sunshine Ordinance Task Force that he was going to be out of town in March, yet the Ethics Commission calendared his hearing while he was out of town.

#### **VIII. Adjournment.**

**Motion 14-04-28-06 (Renne/Hayon) Moved, seconded and passed (5-0) that the Ethics Commission adjourn.**

The meeting adjourned at 8:24 PM.







Ethics Commission



25 Van Ness Ave., Suite 220  
San Francisco, CA 94102  
Phone 252-3100 Fax 252-3112

**SAN FRANCISCO ETHICS COMMISSION  
NOTICE OF REGULAR MEETING CANCELLATION**

**May 26, 2014, 5:30 P.M.**

**Room 400 City Hall**

**1 Dr. Carlton B. Goodlett Place, San Francisco**

**AND**

**SAN FRANCISCO ETHICS COMMISSION  
NOTICE OF SPECIAL MEETING**

**May 28, 2014, 5:30 P.M.**

**and AGENDA**

**Room 416 City Hall**

**1 Dr. Carlton B. Goodlett Place, San Francisco**

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**NOTE: THIS IS NOT THE DATE OF THE COMMISSION'S REGULAR MEETING OR THE COMMISSION'S REGULAR MEETING ROOM.**

- I. Call to order and roll call.
- II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.
- III. Discussion and possible action on the Ethics Commission's policy response to the United States Supreme Court's decision in *McCutcheon v. Federal Election Commission*, No. 12-536. (Attachments: Memorandum to Commission and draft Resolution.)
- IV. Discussion and possible action regarding pending litigation as defendant, *Grossman v. John St. Croix, Executive Director, and San Francisco Ethics Commission*, San Francisco County Superior Court, Case No. CPF-13-513221; California Court of Appeal 1st Dist., Case No. A140308. Possible Closed Session.
  - a. Public comment on all matters pertaining to Agenda Item IV, including whether to meet in closed session.
  - b. Vote on whether to assert attorney-client privilege and meet in closed session under Brown Act section 54956.9 and Sunshine Ordinance section 67.10(d) to discuss pending litigation as defendant. (Action.)

- c. Conference with Legal Counsel: Pending litigation as defendant. (Discussion and possible action.)

Number of possible cases: 1

- d. Discussion and vote pursuant to Brown Act section 54957.1 and Sunshine Ordinance section 67.12 on whether to disclose any action taken or discussions held in closed session regarding pending litigation as defendant. (Discussion and possible action.)

Motion: The Ethics Commission moves (not) to disclose its closed session deliberations re: pending litigation.

V. Discussion and possible action regarding a complaint received or initiated by the Ethics Commission. Possible Closed Session.

- a. Public comment on all matters pertaining to Agenda Item V, including whether to meet in closed session.
- b. Vote on whether to assert attorney-client privilege and meet in closed session under Charter section C3.699-13, Brown Act section 54956.9 and Sunshine Ordinance section 67.10(d) to discuss anticipated litigation as plaintiff. (Action.)
- c. Conference with Legal Counsel: Anticipated litigation as plaintiff. (Discussion and possible action.)

Number of possible cases: 3

- d. Discussion and vote pursuant to Brown Act section 54957.1 and Sunshine Ordinance section 67.12 on whether to disclose any action taken or discussions held in closed session regarding anticipated litigation as plaintiff. (Discussion and possible action.)

Motion: The Ethics Commission moves (not) to disclose its closed session deliberations re: anticipated litigation.

VI. Discussion and possible action on the minutes of the Commission's meeting of April 28, 2014. (Attachment: April 28, 2014 draft minutes.)

VII. Discussion of Executive Director's Report. An update of important Ethics Commission staff activities since the previous monthly meeting. The written report, which is available at the Commission office and on its website, covers the investigation and enforcement program, revenues, campaign finance disclosure program, revenues, public financing/campaign finance audit program, lobbyist program, campaign consultant program, and outreach and education. Any of these subjects may potentially be part of the Director's presentation or discussed by the Commission. (Attachment: Executive Director's Report.)

- VIII. **Items for future meetings.** Commissioners may propose items for future agendas and the Commission may determine the priority of these items. (Discussion.)
- IX. **Adjournment.**

There will be an opportunity for public comment on each agenda item.

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Ethics Commission



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NOTICE OF REGULAR MEETING CANCELLATION**

**May 26, 2014, 5:30 P.M.**

**Room 400 City Hall**

**1 Dr. Carlton B. Goodlett Place, San Francisco**

**AND**

**SAN FRANCISCO ETHICS COMMISSION  
NOTICE OF SPECIAL MEETING**

**May 28, 2014, 5:30 P.M.**

**and AGENDA**

**Room 416 City Hall**

**1 Dr. Carlton B. Goodlett Place, San Francisco**

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- I. Call to order and roll call.
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# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR  
CHAIRPERSON

PAUL A. RENNE  
VICE-CHAIRPERSON

BRETT ANDREWS  
COMMISSIONER

BEVERLY HAYON  
COMMISSIONER

PETER KEANE  
COMMISSIONER

JOHN ST. CROIX  
EXECUTIVE DIRECTOR

Date: May 18, 2014

To: Members, Ethics Commission

From: John St. Croix, Executive Director  
By: Jesse Mainardi, Deputy Executive Director

Re: Commission Response to *McCutcheon v. Federal Election Commission*

## Introduction

This memorandum briefly discusses recommended Commission actions with respect to Campaign and Governmental Conduct Code section 1.114(a)(2) ("Section 1.114(a)(2)"), the aggregate limit on contributions to City candidates in a given election, in light of the United States Supreme Court's opinion in *McCutcheon v. Federal Election Commission*, No. 12-536.

In short, staff recommends that the Commission resolve to suspend enforcement of Section 1.114(a)(2), and that it direct staff to prepare an ordinance repealing that section, either alone or as part of a package of amendments to the City's Campaign Finance Reform Ordinance ("CFRO").

## Legal Background

In *McCutcheon*, the Court struck down as unconstitutional a federal law limiting how much an individual could contribute to federal candidates, parties and PACs in a two-year election cycle. The Court found that this federal aggregate limit violated the First Amendment because it did not serve to prevent *quid pro quo* corruption and because it unnecessarily abridged contributors' associational freedoms.

Section 1.114(a)(2) similarly imposes an aggregate limit on contributions to City candidates in a given City election.<sup>1</sup> Although the federal and City aggregate limits are not identical, staff believes that there are no constitutionally significant differences between the two limits, and that Section 1.114(a)(2) is therefore not likely to withstand constitutional challenge.

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<sup>1</sup> Section 1.114(a)(2) provides that "[n]o person shall make any contribution which will cause the total amount contributed by such person to all candidate committees in an election to exceed \$500 multiplied by the number of city elective offices to be voted on at that election."

### Options and Decision Points

Given that the *McCutcheon* case indicates that Section 1.114(a)(2) is constitutionally suspect, staff recommends that the Commission do the following:

1. Adopt a resolution of non-enforcement. Staff recommends that the Commission adopt a resolution stating that the aggregate limit in Section 1.114(a)(2) will not be enforced against contributors in City elections. A draft resolution to this effect is attached as Exhibit A. If the Commission adopts this (or a substantially similar) resolution, staff will publicize the resolution, update the Commission's educational materials, and advise that contributors to City candidates are not subject to the aggregate limit in Section 1.114(a)(2).

In this regard, it is worth noting that other jurisdictions with their own aggregate contribution limits, including the City of Los Angeles and the states of Maryland, Massachusetts and Wisconsin have already publicly announced that they will suspend enforcement of those limits in response to *McCutcheon*.

**Decision Point 1:** Shall the Commission adopt the attached resolution stating that the aggregate contribution limit in Section 1.114(a)(2) will not be enforced?

2. Propose a repeal of Section 1.114(a)(2). Staff also recommends that it prepare for consideration by the Commission and the Board of Supervisors ("Board") an ordinance repealing Section 1.114(a)(2).<sup>2</sup> The repeal may be proposed either alone or as part of a package of amendments to CFRO. A simple repeal of Section 1.114(a)(2) could of course be accomplished more expeditiously, and the Commission could consider such a repeal as early as at its next meeting.

However, waiting for staff to produce a package of amendments would allow the Commission to propose other improvements and changes to CFRO without having to return to the Board at a later date. Moreover, a statement of non-enforcement of Section 1.114(a)(2) should alleviate any constitutional concerns regarding the aggregate limit pending approval of the new ordinance.

In addition to repealing Section 1.114(a)(2), a package of amendments might include, among other things, provisions that:

- Consolidate and clarify the City's disclaimer and reporting requirements for campaign communications by City candidates and by third parties, and institute more frequent reporting requirements for certain communications.
- Extend the City's disclaimer requirements to certain electronic communications and otherwise harmonize these requirements to a greater degree with state law.

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<sup>2</sup> Amendments to CFRO must be approved by a four-fifths vote of the Ethics Commission and a two-thirds vote of the Board. (CFRO § 1.103.)

- Allow a candidate receiving public financing to designate a certain percentage of his or her campaign expenditures as compliance costs that would not count towards the individual expenditure ceiling.
- Repeal the \$500 annual contribution limit to PACs that support or oppose candidates, which a court has permanently enjoined the City from enforcing.

Staff anticipates that the process of drafting a package of proposed amendments, including the solicitation of public input through interested persons meetings, will require approximately six to nine months. Staff would aim to make such amendments effective in advance of the November 2015 Mayoral election.

**Decision Point 2:** Shall the Commission direct the staff to draft an ordinance repealing solely Section 1.114(a)(2), or shall it direct the staff to include such a provision in a planned future package of CFRO amendments?

### Conclusion

Staff has proposed the actions it believes are called for by the *McCutcheon* opinion, namely a resolution suspending enforcement of Section 1.114(a)(2), and an ordinance repealing that section.

\* \* \* \* \*

## RESOLUTION

WHEREAS the United States Supreme Court, in a 5-4 vote, decided *McCutcheon v. Federal Election Commission*, 572 U.S. \_\_\_, No. 12-536 (S. Ct. Apr. 2, 2014) on April 2, 2014, striking down section 441a(a)(3) of Title 2 of the United States Code; and

WHEREAS section 1.114(a)(2) of the San Francisco Campaign Finance Reform Ordinance (“CFRO”), Article I, Chapter 1 of the Campaign & Governmental Conduct Code, is similar to the provision at issue in the *McCutcheon* case in that it imposes an aggregate contribution limit how much a person may contribute to multiple candidates in a single City election; and

WHEREAS in light of the legal precedent and reasoning set forth in the *McCutcheon* case, CFRO section 1.114(a)(2) should not be enforced at this time; and

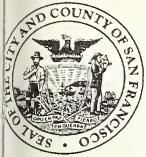
THEREFORE, BE IT RESOLVED by the San Francisco Ethics Commission that, as of the date of this resolution, it will do the following:

- Suspend enforcement of CFRO section 1.114(a)(2)
- Advise that contributors and committees are not subject to an aggregate limit on total contributions in a single election

I certify that this resolution was adopted by the San Francisco Ethics Commission on May 28, 2014.

\_\_\_\_\_  
John St. Croix, Executive Director  
San Francisco Ethics Commission

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# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR  
CHAIRPERSON

PAUL A. RENNE  
VICE-CHAIRPERSON

BRETT ANDREWS  
COMMISSIONER

BEVERLY HAYON  
COMMISSIONER

PETER KEANE  
COMMISSIONER

JOHN ST. CROIX  
EXECUTIVE DIRECTOR

## EXECUTIVE DIRECTOR'S REPORT TO THE SAN FRANCISCO ETHICS COMMISSION For the Special Meeting of May 28, 2014

### 1. Budget/Staffing.

The Mayor's general department budget should be announced on June 1, 2014. Budget hearings at the Board of Supervisors are underway; the Ethics Commission will appear at the BOS later in June.

### 2. Investigation and enforcement program.

As of May 19, 2014, there were 21 pending formal complaints alleging violations within the Ethics Commission's jurisdiction.

Category	# of Complaints
Campaign Finance	15
Conflict of Interest	2
Governmental Ethics	0
Lobbyist Ordinance	0
Campaign Consultant Ordinance	2
Sunshine Ordinance	2
<b>TOTAL</b>	<b>21</b>

### 3. Campaign finance disclosure program.

a. Filing deadline. May 22, 2014 was the filing deadline for the Second Pre-Election statement, which covers the reporting period ending May 17, 2014.

Due to recent changes to the Campaign Finance Reform Ordinance and Ethics Commission regulations, all committees must now file electronic statements and complete electronic signature requirements. Staff has informed treasurers and candidates about the new requirements and has provided detailed instructions. Staff continues to inform and assist committees during this transition.

b. Collection of late filing fees and contribution forfeitures. In fiscal year 2013-2014, as of April 30, 2014, the Commission collected a total of \$13,736 in campaign finance late fees and forfeitures. Outstanding late fees and forfeitures total \$17,795, of which \$13,260 is pending at the Bureau of Delinquent Revenues (BDR).

c. Status of accounts to San Francisco Bureau of Delinquent Revenues (BDR). The following chart provides details on active accounts referred to BDR as of April 30, 2014:



Minutes of the Special Meeting of  
The San Francisco Ethics Commission  
May 28, 2014  
Room 416, City Hall  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102

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**I. Call to order and roll call.**

Chairperson Hur called the meeting to order at 5:30 PM.

COMMISSION MEMBERS PRESENT: Benedict Y. Hur, Chairperson; Paul Renne, Vice-Chairperson; Brett Andrews, Commissioner; Beverly Hayon, Commissioner (arrived at 5:45 PM); Peter Keane, Commissioner.

STAFF PRESENT: John St. Croix, Executive Director; Jesse Mainardi, Deputy Executive Director; Garrett Chatfield, Investigator/Legal Analyst.

OFFICE OF THE CITY ATTORNEY: Josh White, Deputy City Attorney (DCA).

OTHERS PRESENT: Allen Grossman; Ray Hartz; Derek Kerr; Peter Warfield; Hope Johnson; Michael Petrelis; Patrick Monette-Shaw; David Pilpel; Anita Mayo; and other unidentified members of the public.

**MATERIALS DISTRIBUTED:**

- Staff Memorandum re: Commission Response to McCutcheon v. Federal Election Commission and Resolution, dated May 18, 2014;
- Draft minutes of the Commission's Regular Meeting of April 28, 2014;
- Executive Director's Report.

**II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.**

Allen Grossman stated that Executive Director St. Croix is hostile to open government. He stated that Executive Director St. Croix dismissed 40 Sunshine Ordinance Task Force referrals since 2005. Mr. Grossman stated that he is currently a litigant in a pending action against the Ethics Commission and that he successfully sued the Ethics Commission in 2009.

Ray Hartz stated that the City Attorney encourages City employees to withhold public records. He stated that he has 17 orders of determination from the Sunshine Ordinance Task Force and one against Deputy City Attorney Paula Jessen.

Derek Kerr stated that the City had to pay \$25,000 in 2009 to Mr. Grossman. He stated that the Ethics Commission is tasked with enforcing all ethics laws including those related to open government.

Hope Johnson stated that the City Attorney is overreaching regarding the current litigation with Mr. Grossman. She stated that the bylaws for the Ethics Commission require the Commission to comply with the Sunshine Ordinance. She stated that the City Attorney cannot give assistance to City departments regarding the withholding of public records.

Commissioner Keane objected to postponing this item until the next meeting. He stated that there was no substantive violation of the spirit of the Sunshine Ordinance by not providing the documents. He stated that the agenda references the court case number and that those documents are publicly available from the court.

DCA White stated that the reference to the court case number is insufficient to meet the requirements of the Sunshine Ordinance and he recommended that the Commission calendar this item for another meeting and provide the court documents that were given to the Commission members.

Chairperson Hur continued the item to a future meeting.

**V. Discussion and possible action regarding three complaints received or initiated by the Ethics Commission. Possible Closed Session.**

Public Comment:

Ray Hartz stated that closed session items give the appearance that the Ethics Commission has something to hide. He stated that the agenda does not properly inform the public about the closed session discussion.

**Motion 14-05-28-02 (Renne/Hur) Moved, seconded and passed (3-2, Andrews and Keane dissenting) that the Ethics Commission move into closed session.**

The Ethics Commission went into closed session at 6:48 PM. All members of the public left the hearing room. The Commission members, Executive Director St. Croix, Deputy Executive Director Mainardi, staff member Mr. Chatfield, and DCA White remained in the hearing room during closed session.

The Ethics Commission returned to open session at 7:30 PM. No members of the public returned to the hearing room.

Chairperson Hur stated that during closed session the Commission made a motion to disclose the reason why the Commission held a closed session, which was to address three probable cause reports, and that the Commission is required under its regulations to go into closed session to discuss probable cause reports. He stated that the Commission also discussed that in the future the Commission will disclose the reasons for the closed session prior to and when it returns from closed session.

Executive Director St. Croix announced that the Commission found probable cause to believe that Alpha Buie, the treasurer of the African American Democratic Club, committed three violations of the San Francisco Campaign Finance Reform Ordinance by failing to file campaign statements.

Executive Director St. Croix announced that the Commission found probable cause to believe that Jacqueline Norman, a former candidate and the treasurer of the Committee to Elect Norman Supervisor 2012, committed six violations of the San Francisco Campaign Finance Reform Ordinance by failing to file campaign statements.

Executive Director St. Croix announced that the Commission found probable cause to believe that Ted Gullicksen, Treasurer for the Committee To Stop Mass Demolition of Housing, A Committee to Support Proposition \_\_, committed six violations of the San Francisco Campaign Finance Reform Ordinance by failing to file campaign statements.

The Commissioners each certified that he or she personally heard or read the testimony, reviewed the evidence, or otherwise reviewed the entire record of the proceedings for each of the three probable cause hearings conducted in closed session.

Public Comment:

None.

**VI. Discussion and possible action on the minutes of the Commission's meeting of April 28, 2014.**

**Motion 14-05-28-03 (Renne/Keane) Moved, seconded and passed (5-0) that the Ethics Commission approve the minutes of the Commission's meeting of April 28, 2014.**

Public Comment:

None.

**VII. Discussion of Executive Director's Report.**

Executive Director St. Croix introduced the item and briefly outlined the budget process in response to Commissioner Andrews.

Responding to a question from Chairperson Hur, Executive Director St. Croix stated that the Ethics Commission has no jurisdiction to enforce Form 700 Statement of Economic Interests violations because the California Fair Political Practices Commission has exclusive jurisdiction over those matters. He stated that the Ethics Commission may only impose late fines for the failure to file a Form 700 by the required deadline.

Public Comment:

None.

**VIII. Items for future meetings.**

Commissioner Andrews requested that Commission discuss the Board of Supervisors' proposed changes to the Lobbyist Ordinance.

Public Comment:

None.

**IX. Adjournment.**

**Motion 14-05-28-04 (Hayon/Renne) Moved, seconded, and passed (5-0) that the Ethics Commission adjourn.**

The meeting adjourned at 7:45 PM.



Minutes of the Special Meeting of  
The San Francisco Ethics Commission  
May 28, 2014  
Room 416, City Hall  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102

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**I. Call to order and roll call.**

Chairperson Hur called the meeting to order at 5:30 PM.

COMMISSION MEMBERS PRESENT: Benedict Y. Hur, Chairperson; Paul Renne, Vice-Chairperson; Brett Andrews, Commissioner; Beverly Hayon, Commissioner (arrived at 5:45 PM); Peter Keane, Commissioner.

STAFF PRESENT: John St. Croix, Executive Director; Jesse Mainardi, Deputy Executive Director; Garrett Chatfield, Investigator/Legal Analyst.

OFFICE OF THE CITY ATTORNEY: Josh White, Deputy City Attorney (DCA).

OTHERS PRESENT: Allen Grossman; Ray Hartz; Derek Kerr; Peter Warfield; Hope Johnson; Michael Petrelis; Patrick Monette-Shaw; David Pilpel; Anita Mayo; and other unidentified members of the public.

**MATERIALS DISTRIBUTED:**

- Staff Memorandum re: Commission Response to McCutcheon v. Federal Election Commission and Resolution, dated May 18, 2014;
- Draft minutes of the Commission's Regular Meeting of April 28, 2014;
- Executive Director's Report.

**II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.**

Allen Grossman stated that Executive Director St. Croix is hostile to open government. He stated that Executive Director St. Croix dismissed 40 Sunshine Ordinance Task Force referrals since 2005. Mr. Grossman stated that he is currently a litigant in a pending action against the Ethics Commission and that he successfully sued the Ethics Commission in 2009.

Ray Hartz stated that the City Attorney encourages City employees to withhold public records. He stated that he has 17 orders of determination from the Sunshine Ordinance Task Force and one against Deputy City Attorney Paula Jessen.

Derek Kerr stated that the City had to pay \$25,000 in 2009 to Mr. Grossman. He stated that the Ethics Commission is tasked with enforcing all ethics laws including those related to open government.

Hope Johnson stated that the City Attorney is overreaching regarding the current litigation with Mr. Grossman. She stated that the bylaws for the Ethics Commission require the Commission to comply with the Sunshine Ordinance. She stated that the City Attorney cannot give assistance to City departments regarding the withholding of public records.



Michael Petrelis stated that he is a gay blogger and person with AIDS. He stated that he was wearing a button that said silence equals death. He stated that more sunshine is needed in government. He stated that sunshine equals life.

Patrick Monette-Shaw stated that the description of Item IV does not meet the requirements under the Sunshine Ordinance, and it violates section 67.11 of the Sunshine Ordinance by failing to describe what will be considered in closed session.

David Pilpel stated that he had suggested edits for the draft minutes and would like the Commission to set an agenda item at a future meeting to discuss changes to the lobbyist ordinance and Civil Grand Jury report.

### **III. Discussion and possible action on the Ethics Commission's policy response to the United States Supreme Court's decision in *McCutcheon v. Federal Election Commission*, No. 12-536.**

Executive Director St. Croix introduced the item.

Commissioner Keane stated that McCutcheon makes enforcing aggregate limits unconstitutional. He stated that the Commission should adopt the resolution to give notice to committees that the Commission will not enforce its aggregate limit prescriptions.

In response to Commissioner Andrews, Executive Director St. Croix stated that the Campaign Finance Reform Ordinance will need some future changes.

Commission Andrews stated that it makes sense to adopt the resolution then make the amendments to the aggregate limit laws along with other necessary changes.

#### Public Comment:

Ray Hartz stated that the Commission is just rearranging deck chairs on the Titanic with regard to campaign finance rules. He stated that the Commission spends 90 percent of its time dealing with campaign finance issues and ignores misconduct by public officials. He stated that the Ethics Commission is not a fair body and always grants waivers to City employees who want to work for City contractors.

Anita Mayo stated she supported the resolution and repeal of the aggregate limit rules.

David Pilpel stated that he supported the adoption of the resolution and that the Commission should hold interested persons meetings for any proposed changes to campaign finance laws.

Michael Petrelis stated that the Ethics Commission never enforced the aggregate limit rules anyway. He stated that the Commission is not a public watchdog.

Patrick Monette-Shaw stated that the Ethics Commission is a failure at enforcing Sunshine Ordinance Task Force referrals. He stated that the Ethics Commission now wants to stop enforcing aggregate limits. He stated that if the Ethics Commission continues to abrogate its duties it should be disbanded.

Peter Warfield stated that the language used in the agenda for this item does not apprise an ordinary person on whether his or her interests would be affected. He stated that someone might not know that the



McCutcheon decision relates to aggregate limits. He stated that McCutcheon interpreted federal law and this action is about a local law.

**Motion 14-05-28-01 (Keane/Renne) Moved, seconded and passed (5-0) that the Ethics Commission suspend enforcement of the aggregate contribution limit found in Campaign and Governmental Conduct code section 1.114(a)(2) given the United States Supreme Court's decision in McCutcheon v. Federal Election Commission, No. 12-536, and direct staff to prepare a package of amendments to the San Francisco Campaign Finance Reform Ordinance, including a repeal of section 1.114(a)(2).**

- IV. Discussion and possible action regarding pending litigation as defendant, Grossman v. John St. Croix, Executive Director, and San Francisco Ethics Commission, San Francisco County Superior Court, Case No. CPF-13-513221; California Court of Appeal 1st Dist., Case No. A140308. Possible Closed Session.**

Public Comment:

Allen Grossman stated that he has no way of knowing what the Commission knows about this litigation. He stated that any materials the Commission received in connection with this item should have been provided to the public.

Derek Kerr stated that the Commission does not need to go into closed session regarding this item.

Patrick Monette-Shaw stated that the appeal for this item was not properly brought to the court. He stated that the Ethics Commission cannot delegate litigation to the Executive Director.

Ray Hartz stated that the Ethics Commission has descended into political theater. He stated that the agenda does not let the public know what will be discussed in closed session. He stated that the citizens of San Francisco want open government.

Michael Petrelis stated that the Commission should discuss this item in open session. He stated that City Attorney Herrera allowed an author into the attorney-client conversations regarding the marriage equality cases.

An unidentified member of the public stated that the Ethics Commission never authorized this litigation.

Peter Warfield stated that this item should be discussed in open session. He stated that the Civil Grand Jury called the Ethics Commission a sleeping watchdog, but it really is awake and guarding secrecy.

An unidentified member of the public stated that she sat on the Civil Grand Jury three years ago and nothing has changed. She stated that the Ethics Commission has abrogated its authority to the Executive Director.

Hope Johnson stated that if materials were provided to the Ethics Commission then those documents should be provided to the public.

DCA White stated that the Commission was provided with the documents filed with the court regarding the litigation. He stated that those documents should have been made available at the meeting and the Commission should put this item over to the next meeting so it can be noticed with the documents available to the public.



Commissioner Keane objected to postponing this item until the next meeting. He stated that there was no substantive violation of the spirit of the Sunshine Ordinance by not providing the documents. He stated that the agenda references the court case number and that those documents are publicly available from the court.

DCA White stated that the reference to the court case number is insufficient to meet the requirements of the Sunshine Ordinance and he recommended that the Commission calendar this item for another meeting and provide the court documents that were given to the Commission members.

Chairperson Hur continued the item to a future meeting.

**V. Discussion and possible action regarding three complaints received or initiated by the Ethics Commission. Possible Closed Session.**

Public Comment:

Ray Hartz stated that closed session items give the appearance that the Ethics Commission has something to hide. He stated that the agenda does not properly inform the public about the closed session discussion.

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The Ethics Commission returned to open session at 7:30 PM. No members of the public returned to the hearing room.

Chairperson Hur stated that during closed session the Commission made a motion to disclose the reason why the Commission held a closed session, which was to address three probable cause reports, and that the Commission is required under its regulations to go into closed session to discuss probable cause reports. He stated that the Commission also discussed that in the future the Commission will disclose the reasons for the closed session prior to and when it returns from closed session.

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The Commissioners each certified that he or she personally heard or read the testimony, reviewed the evidence, or otherwise reviewed the entire record of the proceedings for each of the three probable cause hearings conducted in closed session.

Public Comment:

None.

**VI. Discussion and possible action on the minutes of the Commission's meeting of April 28, 2014.**

**Motion 14-05-28-03 (Renne/Keane) Moved, seconded and passed (5-0) that the Ethics Commission approve the minutes of the Commission's meeting of April 28, 2014.**

Public Comment:

None.

**VII. Discussion of Executive Director's Report.**

Executive Director St. Croix introduced the item and briefly outlined the budget process in response to Commissioner Andrews.

Responding to a question from Chairperson Hur, Executive Director St. Croix stated that the Ethics Commission has no jurisdiction to enforce Form 700 Statement of Economic Interests violations because the California Fair Political Practices Commission has exclusive jurisdiction over those matters. He stated that the Ethics Commission may only impose late fines for the failure to file a Form 700 by the required deadline.

Public Comment:

None.

**VIII. Items for future meetings.**

Commissioner Andrews requested that Commission discuss the Board of Supervisors' proposed changes to the Lobbyist Ordinance.

Public Comment:

None.

**IX. Adjournment.**

**Motion 14-05-28-04 (Hayon/Renne) Moved, seconded, and passed (5-0) that the Ethics Commission adjourn.**

The meeting adjourned at 7:45 PM.









**SAN FRANCISCO ETHICS COMMISSION  
NOTICE OF REGULAR MEETING**

**June 23, 2014, 5:30 P.M.**

**and AGENDA**

**Room 400 City Hall**

**1 Dr. Carlton B. Goodlett Place, San Francisco**

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- I. Call to order and roll call.
- II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.
- III. Discussion regarding legislation passed by the Board of Supervisors on June 17, 2014, which amends the City's Lobbyist Ordinance to, among other things: (1) change the lobbyist qualification threshold; (2) increase the number of City officials covered by the ordinance; (3) modify certain exemptions from the lobbyist registration requirement; (4) impose certain Commission mandates; (5) add new enforcement provisions; and (6) require reporting by certain permit expeditors and developers (BOS File No. 130374). (Attachment: Memorandum to Commission.)
- IV. Discussion and possible action regarding proposed stipulation, decision and order in connection with a complaint initiated or received by the Ethics Commission.  
Possible Closed Session.
  - a. Public comment on all matters pertaining to Agenda Item IV, including whether to meet in closed session.
  - b. Vote on whether to assert attorney-client privilege and meet in closed session under Charter section C3.699-13, Brown Act section 54956.9 and Sunshine Ordinance section 67.10(d) to discuss anticipated litigation as plaintiff. (Action.)
  - c. Conference with Legal Counsel: Anticipated litigation as plaintiff. (Discussion and possible action.)

Number of possible cases: 1
  - d. Discussion and vote pursuant to Brown Act section 54957.1 and Sunshine Ordinance section 67.12 on whether to disclose any action taken or discussions held in closed session regarding anticipated litigation as plaintiff. (Discussion and possible action.)

**Motion:** The Ethics Commission moves (not) to disclose its closed session deliberations re: anticipated litigation.

**V. Discussion and possible action regarding probable cause determinations in connection with complaints received or initiated by the Ethics Commission. Possible Closed Session.**

- a. Public comment on all matters pertaining to Agenda Item V, including whether to meet in closed session.
- b. Vote on whether to assert attorney-client privilege and meet in closed session under Charter section C3.699-13, Brown Act section 54956.9 and Sunshine Ordinance section 67.10(d) to discuss anticipated litigation as plaintiff. (Action.)
- c. Conference with Legal Counsel: Anticipated litigation as plaintiff. (Discussion and possible action.)

Number of possible cases: 3

- d. Discussion and vote pursuant to Brown Act section 54957.1 and Sunshine Ordinance section 67.12 on whether to disclose any action taken or discussions held in closed session regarding anticipated litigation as plaintiff. (Discussion and possible action.)

**Motion:** The Ethics Commission moves (not) to disclose its closed session deliberations re: anticipated litigation.

**VI. Discussion regarding the status and background of pending litigation as defendant, *Grossman v. John St. Croix, Executive Director, and San Francisco Ethics Commission*, San Francisco County Superior Court, Case No. CPF-13-513221; California Court of Appeal 1st Dist., Case No. A140308. Possible Closed Session. (Attachments: Order to Show Cause, Court Docket and Appellate Briefs.)**

- a. Public comment on all matters pertaining to Agenda Item VI, including whether to meet in closed session.
- b. Vote on whether to assert attorney-client privilege and meet in closed session under Brown Act section 54956.9 and Sunshine Ordinance section 67.10(d) to discuss pending litigation as defendant. (Action.)
- c. Conference with Legal Counsel: Pending litigation as defendant. (Discussion and possible action.)

Number of possible cases: 1

- d. Discussion and vote pursuant to Brown Act section 54957.1 and Sunshine Ordinance section 67.12 on whether to disclose any action taken or discussions held in closed session regarding pending litigation as defendant. (Discussion and possible action.)

**Motion:** The Ethics Commission moves (not) to disclose its closed session deliberations re: pending litigation.

- VII. Discussion and possible action on the minutes of the Commission's meeting of May 28, 2014. (Attachment: May 28, 2014 draft minutes.)
- VIII. Discussion of Executive Director's Report. An update of important Ethics Commission staff activities since the previous monthly meeting. The written report, which is available at the Commission office and on its website, covers the investigation and enforcement program, revenues, campaign finance disclosure program, revenues, public financing/campaign finance audit program, lobbyist program, campaign consultant program, and outreach and education. Any of these subjects may potentially be part of the Director's presentation or discussed by the Commission. (Attachment: Executive Director's Report.)
- IX. Items for future meetings. Commissioners may propose items for future agendas and the Commission may determine the priority of these items. (Discussion.)
- X. Adjournment.

There will be an opportunity for public comment on each agenda item.

Materials contained in the Commission packets for meetings are available for inspection and copying during regular office hours at the Ethics Commission, 25 Van Ness Avenue, Suite 220, at least 72 hours prior to meetings. Any materials distributed to members of the Ethics Commission within 72 hours of the meeting or after the agenda packet has been delivered to the members are available for public inspection at the Ethics Commission, 25 Van Ness Avenue, Suite 220, San Francisco, during normal office hours.

Cell phones, pagers and similar sound-producing electronic devices: The ringing of and use of cell phones, pagers and similar sound-producing electronic devices are prohibited at this meeting. The Chair may order the removal from the meeting room of any person responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic devices.

**Disability Access:** The Ethics Commission meeting will be held in Room 400, City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA. The Commission meeting room is wheelchair accessible. The closest accessible BART station is the Civic Center Station at United Nations Plaza and Market Street. Accessible MUNI lines serving this location are: #42 Downtown Loop, and #71 Haight/Noriega and the F Line to Market and Van Ness and the Metro Stations at Van Ness and Market and at Civic Center. For information about MUNI accessible services call (415) 923-6142. There is accessible curbside parking adjacent to City Hall on Grove Street and Van Ness Avenue and in the vicinity of the Veterans Building at 401 Van Ness Avenue adjacent to Davies Hall and the War Memorial Complex.

To obtain a disability-related modification or accommodation, including auxiliary aids or services, to participate in a meeting, please contact the Ethics Commission at least 48 hours before the meeting, except for Monday meetings, for which the deadline is 4:00 p.m. the previous Friday. Late requests will be honored, if possible. Services available on request include the following: American sign language interpreters or the use of a reader during a meeting, a sound enhancement system, and/or alternative formats of the agenda and minutes. Please contact the Ethics Commission (415) 252-3100 to make arrangements for a disability-related modification or accommodation.

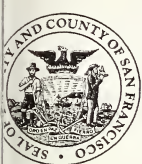
**Chemical-Based Products:** In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical-based products. Please help the City accommodate these individuals.

**KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE** (Chapter 67 of the San Francisco Administrative Code): Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils, and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

**FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE SUNSHINE ORDINANCE, CONTACT THE SUNSHINE ORDINANCE TASK FORCE**, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102-4689; phone: (415) 554-7724; fax: (415) 554-7854; email: [SOTF@SFGOV.ORG](mailto:SOTF@SFGOV.ORG). Copies of the Sunshine Ordinance can be obtained from the Clerk of the Sunshine Task Force, at the San Francisco Public Library, and on the City's website at <http://www.sfgov.org>

**Lobbyist Registration and Reporting Requirements:** Individuals who influence or attempt to influence local policy or administrative action may be required by the San Francisco Lobbyist Ordinance (San Francisco Campaign and Governmental Conduct Code sections 2.100 – 2.160) to register and report lobbying activity. For more information about the Lobbyist Ordinance, please contact the Ethics Commission at 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102; telephone (415) 252-3100, fax (415) 252-3112; and website: [www.sfgov.org/ethics](http://www.sfgov.org/ethics).

*S:\AGENDA\2014\6.23.2014.doc*



# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR  
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VICE-CHAIRPERSON

BRETT ANDREWS  
COMMISSIONER

BEVERLY HAYON  
COMMISSIONER

PETER KEANE  
COMMISSIONER

JOHN ST. CROIX  
EXECUTIVE DIRECTOR

Date: June 18, 2014

To: Members, Ethics Commission

From: John St. Croix, Executive Director  
By: Jesse Mainardi, Deputy Executive Director

Re: Pending Amendments to the City's Lobbyist Ordinance

This memorandum summarizes the key provisions of legislation amending the City's Lobbyist Ordinance, which was introduced by Board of Supervisors President David Chiu and passed by the Board on June 17, 2014 (the "Chiu legislation").<sup>1</sup> The Chiu legislation makes the following changes to the Lobbyist Ordinance:

1. Lobbyist qualification threshold. The Chiu legislation eliminates the current monetary threshold necessary to qualify as a City lobbyist (i.e., earning \$3,000 in a three-month period for lobbying services, including one lobbying contact), and imposes a bright-line "contacts" test. More specifically, an individual will qualify as a lobbyist by making either:

- One or more compensated lobbying contacts on behalf of a client, or
- Five or more compensated lobbying contacts within one calendar month on behalf of his or her employer (unless the individual owns 20 percent or more of the employing entity).

The intent behind this change is to make the lobbyist registration rules easier to enforce.

2. Covered City officials. The Chiu legislation expands the list of those City officials with whom contacts will trigger lobbyist registration and reporting.<sup>2</sup>

<sup>1</sup> Unlike CFRO, the Lobbyist Ordinance may be amended by the Board without approval by the Commission. The ordinance will take effect 30 days after the Mayor's signs it. The Mayor had not signed the ordinance as of the date of this memorandum.

<sup>2</sup> Those additional City officials include members of the First Five Commission, the Law Library Board of Trustees, the Local Agency Formation Commission, the Health Authority Board, the Housing Authority Commission, the Parking Authority, the Relocation Appeals Board, the Successor Agency to the former Redevelopment Agency and its Oversight Board, the Successor Agency Commission, and the Workforce Investment San Francisco Board. The Lobbyist Ordinance will also apply to any CEO appointed by any City board or commission.

3. Exemptions from lobbyist registration. The Lobbyist Ordinance currently exempts a number of communications with City officials from triggering lobbyist registration. In this regard, the Chiu legislation:

- Eliminates the exemption for communications by persons “performing a duty or service that can be performed only by an attorney.” However, the legislation also clarifies that attorneys contacting City officials while engaged in the “practice of law” does not constitute lobbying.
- Narrows the exemption for communications in connection with bidding on a City contract, negotiating the terms of a City contract, or administering a City contract. The exemption will no longer apply to a City contractor’s outside consultants or independent contractors.
- Adds an exemption for communications by officers and employees of 501(c)(3) non-profit organizations. The exemption also applies to communications by officers and employees of 501(c)(4) non-profit organizations that file either an IRS Form 990-N or an IRS Form 990-EZ (i.e., having annual gross receipts of less than \$200,000 and assets valued at less than \$500,000).

4. Commission mandates. In addition to requiring the Commission to process the registration and reporting of additional lobbyists under the new rules, the Chiu legislation imposes a number of new mandates on the Commission, some of which are not directly related to the Lobbyist Ordinance. More specifically, it requires the Commission to:

- Conduct random audits of at least one lobbyist per year.
- Post reports on the Commission’s website on April 10 and May 10 of each year listing those high-ranking City officials who fail to file their annual Statement of Economic Interests (FPPC Form 700) with the Commission.
- Make lobbyist training available online.<sup>3</sup> (The Commission already provides such online training, but will have to update it to incorporate the Chiu legislation.)
- Publish a public guide regarding City contribution limits and prohibitions, reporting requirements, and other relevant campaign finance rules. (The Commission already makes such a guide available on its website.)

---

<sup>3</sup> Lobbyists will also be required to file a statement with the Commission certifying that they have completed the training annually.

5. Enforcement provisions. The Chiu legislation contains provisions that will facilitate or otherwise impact enforcement of the Lobbyist Ordinance. The legislation:

- Requires any lobbyist, or person required to be registered as a lobbyist, to provide the Commission with any documentation required to be maintained under the Lobbyist Ordinance, within ten days of a request.
- Imposes a duty for City officers and employees to assist the Commission, the City Attorney, or the District Attorney with any investigations of violations of the Lobbyist Ordinance.
- Establishes that a lobbyist's client or employer is jointly and severally liable for any lobbyist violations of the Lobbyist Ordinance occurring in the course of the lobbyist's representation of that client or employer.

6. Permit expeditors. The Chiu legislation creates new registration and reporting requirements for permit expeditors effective in 2015. More specifically, permit expeditors for certain large projects will have to register and file quarterly reports with the Commission when they contact officers or employees of the Department of Building Inspection, the Entertainment Commission, the Planning Commission, or the Department of Public Works on behalf of a client. The reporting requirements differ somewhat from those of lobbyists. For example, permit expeditors will have to describe all permits they are seeking, the clients for whom they are seeking the permits, and each City official they contact in connection with each permit. However, they will not have to report "activity expenses" (e.g., gifts) or the dates of their contacts. The Commission must report to the Board on the implementation of the permit expeditor reporting system in 2016 and 2017.

7. Developer disclosures. The Chiu legislation requires developers of major City projects to file reports with the Commission disclosing donations of \$5,000 or more to nonprofit entities that have lobbied the City regarding the developers' projects.

\* \* \* \* \*



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JOHN ST. CROIX, ET AL.,  
Petitioners,

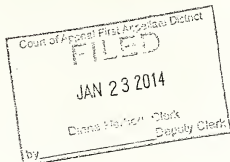
v.

THE SUPERIOR COURT OF SAN  
FRANCISCO COUNTY,

Respondent;

ALLEN GROSSMAN,

Real Party in Interest.



A140308

(San Francisco County  
Super. Ct. No. CPR13513221)

BY THE COURT:<sup>1</sup>

ORDER TO SHOW CAUSE

Good cause appearing from the petition for writ of mandate and/or prohibition on file in this action, respondent superior court is ordered to show cause when the matter is ordered on calendar why the relief requested in the petition should not be granted.

The return to the petition shall be served and filed within thirty (30) days of the issuance of this order to show cause, unless real party in interest notifies the court in writing of its election to deem its previously filed opposition the return to the petition. The reply to the return shall be served and filed within fifteen (15) days of the filing of the return, unless petitioner notifies the court in writing of its election to deem its previously filed reply the reply to the return. (Cal. Rules of Court, rule 8.487(b).)

This order to show cause is to be served and filed on or before January 24, 2014. It shall be deemed served upon mailing by the clerk of this court of certified copies of this order to all parties to this proceeding and to respondent superior court.

<sup>1</sup> Before Dondero, Acting P.J., Banke, J., and Becton, J. \* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The justices will be familiar with the facts and issues, will have conferred among themselves on the case, and will not require oral argument. If oral argument is requested, the request must be served and filed on or before February 3, 2014. If no request for oral argument is filed on or before that date, the matter will be submitted at such time as the court approves the waiver and the time for filing all briefs and papers has expired. (California Rules of Court, rule 8.256(d)(1).) If oral argument is requested, the court will notify the parties of the exact date and time set for oral argument, which will occur before Division One of this court at the courtroom located on the fourth floor of the State Building, 350 McAllister Street, San Francisco, California.

Date: JAN 23 2014

DONDERO, J.

Acting P.J.

I, DIANA BERREBE, CLERK OF THE COURT OF  
APPEAL STATE OF CALIFORNIA, FIRST  
APPELLATE DISTRICT, DO HEREBY CERTIFY  
THAT THE FOREGOING AND ANNEXED IS A  
TRUE AND CORRECT COPY OF THE ORIGINAL  
ON FILE IN MY OFFICE.

WITNESS MY HAND AND THE SEAL OF THE COURT  
THIS 23rd DAY OF JANUARY 2014

DIANA BERREBE CLERK  
OF THE COURT

Andrew N. Shen  
Office of the City Attorney  
1 Dr. Carlton B. Goodlett Place  
City Hall, Room 234  
San Francisco, CA 94102-4682

**Effective March 17, 2014**

**NEW Local Rule Regarding Mandatory e-filing in the First District Court of Appeal**

Civil Cases must be filed electronically starting on March 17, 2014.  
Criminal and Juvenile cases must be filed electronically starting on April 14, 2014.  
It is anticipated that registration for the mandatory e-filing will begin March 10, 2014 for the March 17, 2014 go-live date. Please consult our website for further updates on the registration process.

Free training for e-filers will be offered on January 31, 2014, in the Milton Marks Auditorium, 350 McAllister Street, San Francisco. A morning session (10:00 a.m.) and an afternoon session (1:30 p.m.) will be offered. Sign up for either of the free sessions by sending an e-mail to [E-Filing.Course@jud.ca.gov](mailto:E-Filing.Course@jud.ca.gov). Please indicate the following information when signing up: 1) name and job title of those registering; 2) professional affiliation; and 3) first preference for time slot on January 31st. You will be notified if your first preference is not available.

pet



## Appellate Courts Case Information

CALIFORNIA COURTS  
THE JUDICIAL BRANCH OF CALIFORNIA

1st Appellate District

Change court ▾

Court data last updated: 11/22/2013 03:05 PM

Docket (Register of Actions)

St. Croix et al. v. Superior Court of the City and County of San Francisco  
Division 1  
Case Number A140308

Date	Description	Notes
11/22/2013	Exempt filing fee.	
11/22/2013	Filed petition for writ of:	Preemptory Writ of Mandate and/or Prohibition Emergency Relief Requested
11/22/2013	Exhibits lodged.	1 Volume
11/22/2013	Request for judicial notice filed.	By petitioner
11/22/2013	Motion filed.	Motion for Stay Under California Government Code Section 6259(c)
11/22/2013	Order filed.	BY THE COURT: Petitioner's motion for stay pursuant to Government Code section 6259, subdivision (c), filed concurrently with the petition in the above-captioned matter, is hereby granted. The order entered by the superior court on October 29, 2013, in case number CPF-13-51322, ordering petitioner to deliver copies of 24 responsive documents to Real Party in Interest is hereby stayed pending resolution of this writ proceeding. The clerk of the court is directed to notify the superior court clerk by telephone of the imposition of this stay. All parties are by this letter placed on notice that the court may choose to act by issuing a peremptory writ in the first instance. (See Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal.3d 171, 177-180.) Real party in interest shall serve and file opposition, if any, to the petition on or before December 23, 2013. (California Rules of Court, rule 8.487(b)(1)-(2).) The opposition shall include a Certificate of Interested Entities or Persons in compliance with Rule 8.488 of the California Rules of Court. Your opposition may be in letter form; however, please submit an original plus

		four copies of your letter brief. If you are not filing an opposition, please inform the court in writing. Counsel are required to list their State Bar numbers on all documents sent to the Court. All parties are directed to include citations and record references in the body of their briefs and not in footnotes. Please note California Rules of Court, rules 8.200(a)(5) & 8.25(b)(3) are not applicable to this proceeding. Petitioner may serve and file a reply by January 7, 2014. (California Rules of Court, rule 8.487(b)(3).)
11/22/2013	Note:	Faxed a copy of the stay order to Judge Ernest H. Goldsmith Notified the Superior Court by telephone regarding stay order

[Click here](#) to request automatic e-mail notifications about this case.

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION \_\_\_\_\_

JOHN ST. CROIX, EXECUTIVE  
DIRECTOR, SAN FRANCISCO  
ETHICS COMMISSION; and SAN  
FRANCISCO ETHICS COMMISSION,

Petitioners/Respondents,

vs.

SUPERIOR COURT OF CALIFORNIA  
FOR THE CITY AND COUNTY OF  
SAN FRANCISCO,

Respondent/Appellant.

ALLEN GROSSMAN,

Real Party in Interest.

Case No. \_\_\_\_\_

San Francisco County Superior  
Court No. CPF-13-513221

**EMERGENCY RELIEF  
REQUESTED**

---

**PETITION FOR PEREMPTORY WRIT OF  
MANDATE AND/OR PROHIBITION  
[CALIFORNIA GOVERNMENT CODE  
SECTION 6259(c)]**

---

The Honorable Ernest H. Goldsmith

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City Attorney  
THERESE M. STEWART, State Bar #104930  
Chief Deputy City Attorney  
VINCE CHHABRIA, State Bar #208557  
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Attorneys for Petitioners

# **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

- ☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.
- ☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: November 22, 2013

DENNIS J. HERRERA  
City Attorney  
THERESE M. STEWART  
Chief Deputy City Attorney  
VINCE CHHABRIA  
Chief of Appellate Litigation  
ANDREW SHEN  
JOSHUA S. WHITE  
Deputy City Attorneys

By: s/Andrew Shen  
ANDREW SHEN

Printed Name: ANDREW SHEN  
Deputy City Attorney

Address: San Francisco City Attorney's Office  
1 Dr. Carlton B. Goodlett Place  
City Hall, Room 234  
San Francisco, CA 94102

State Bar #: 232499

Party Represented: Petitioners JOHN ST. CROIX, in his official  
capacity as Executive Director of the San Francisco  
Ethics Commission and SAN FRANCISCO  
ETHICS COMMISSION

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## INTRODUCTION

Under the San Francisco Charter, the City Attorney is responsible for providing candid, confidential legal advice to the Mayor, the Board of Supervisors, and the City's various agencies and commissions. For over a century the City Attorney's Office has fulfilled these duties by advising its clients subject to the attorney-client privilege and attorney work product protection.

In 1999 the San Francisco voters enacted an ordinance that, among other things, purports to prevent the City Attorney's clients from asserting privilege with respect to certain issues. But it is beyond dispute that an ordinance cannot trump the provisions of a city charter, any more than a state statute can trump the California Constitution. If the voters wish to withdraw the attorney-client and attorney work product privileges from the City or its constituent agencies, they may only do so by amending the Charter.

Notwithstanding this, the Superior Court ordered the City to turn over written, privileged communications between the City Attorney's Office and one of its clients to a local resident. The only reason the Superior Court provided in its ruling was that the 1999 ordinance purports to eliminate the attorney-client and attorney work product privileges for those documents. Although the City's principal argument was that the 1999 ordinance is invalid because it conflicts with the Charter, the Superior Court ordered the City to disclose the documents without so much as considering this fundamental issue. The Superior Court insisted that the Charter argument was not before it, even though both sides agreed that it was, as reflected in the City's opposition brief, the other side's reply to the City's opposition and the dialogue at the hearing.

The Superior Court's refusal to consider the City's primary argument is inexplicable, and its decision to require the City to disclose privileged attorney-client communications is indefensible. The confidentiality of communications between attorney and client are to be jealously guarded, not blithely waived away. Under the expedited appeal process set forth by Government Code section 6259(c) for California Public Records Act matters, the Court should issue a writ ordering the Superior Court to set aside its ruling.

## **PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION**

### **A. Relief Requested**

1. By this verified petition, John St. Croix, Executive Director of the San Francisco Ethics Commission, in his official capacity, and the San Francisco Ethics Commission (referred to collectively as "the City"), defendants/respondents in *Grossman v. St. Croix, et al.*, San Francisco Superior Court Case No. CGC-13-513221 ("the Action"), seek a peremptory writ of prohibition and/or mandate or other extraordinary writ compelling the Superior Court of San Francisco County (Honorable Ernest H. Goldsmith) to set aside its ruling granting a petition for a writ of mandate in favor of Real Party in Interest Allen Grossman and instead to deny Grossman's petition for a writ of mandate and other requested relief.

### **B. Jurisdiction and Timeliness**

2. This Court has jurisdiction over this matter under California Rule of Court 8.486. The City has a beneficial interest in the outcome of this case, which challenges the Superior Court's issuance of a writ of mandate against the City. On October 29, 2013, the Superior Court filed and served its order.

3. California Government Code section 6259(c) provides an expedited appeal process for California Public Records Act disputes:

In an action filed on or after January 1, 1991, an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ. Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days.

Pursuant to section 6259(c), the City filed its petition 24 days after the Superior Court served its order by mail. (*See State Department of Public Health v. Superior Court* (2013) 219 Cal.App.4th 966, 972 n.5 [under section 6259(c), 25-day deadline for writ petition when notice of ruling served by mail].)

4. In enacting section 6259(c), the Legislature intended to replace “review by direct appeal with review by extraordinary writ” in order “to expedite the process and thereby to make the appellate remedy more effective.” (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113.) And “[w]hen an extraordinary writ proceeding is the only avenue of appellate review, a reviewing court’s discretion is quite restricted.” (*Id.* at 113-14.) Thus, under 6259(c), “an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner.” (*Id.* at 114.)

**C. Authenticity of Exhibits**

5. All exhibits that accompany this petition are true and correct copies of original documents on file with Respondent Superior Court and the transcript of the hearing on Grossman's petition for a writ of mandate. The exhibits are incorporated herein by reference as though fully set forth in this petition. The City is also filing a Request for Judicial Notice in connection with this petition, and the documents attached thereto are incorporated herein by reference as though fully set forth in this petition.

**D. The Parties**

6. Petitioners are the Executive Director of the San Francisco Ethics Commission John St. Croix in his official capacity, and the San Francisco Ethics Commission. Petitioners were the named defendants/respondents in the Action.

7. Respondent is the Superior Court of the State of California for the County of San Francisco.

8. Real Party in Interest is Allen Grossman, plaintiff/petitioner in the Action.

**E. The Proceedings Below and Supporting Documents Filed Herewith**

9. On September 18, 2013, Grossman filed a verified petition for writ of mandate ("Petition"). A true and correct copy of the Petition is attached as Exhibit A to the City's Exhibits. As set forth in the Petition, on October 3, 2012, Grossman submitted a public records request, pursuant to the California Public Records Act and the San Francisco Sunshine Ordinance, to Petitioner St. Croix for (1) all drafts and versions of the Ethics Commission's regulations for enforcement of Sunshine Ordinance violations, and (2) all documents relating to the preparation and review of those regulations, *including any communications with the City Attorney's*

*Office.* (See Exhibits in Support of Petition [“Exh.”] A at 6 [emphasis added].) On October 12, 2012, the Ethics Commission provided Grossman with 127 documents, six of which were partially redacted. (*Id.* at 22-23, 50.) At that time, the Ethics Commission withheld additional documents responsive to Grossman’s request, citing attorney-client privilege and attorney work-product as the bases for withholding. (*Id.* at 6, 22-23.)

10. On September 18, 2013, Grossman filed his Petition and a Memorandum of Points and Authorities in Support of his Petition, a true and correct copy of which is attached as Exhibit C. Grossman’s primary argument was that the City could not withhold those privileged documents because under Sunshine Ordinance section 67.24(b)(1)(iii), “[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning” state and local open meetings, public records, and ethics laws were subject to disclosure. (*Id.* at 14-15, Exh. C at 76-77.)

11. On October 9, 2013, the City filed its opposition, a true and correct copy of which is attached as Exhibit D. The City’s opposition principally argued that the San Francisco Charter establishes that the attorney-client and attorney work product privileges apply to communications between the City Attorney’s Office and City officials and departments, and that the Charter trumps the Sunshine Ordinance provision purporting to limit those protections. That argument was the subject of the first paragraph of the introduction to the City’s brief, and appeared at pages five through nine of the discussion section. (Exh. D at 87, 91-95.) In support of its opposition, the City filed the Declaration of Andrew Shen, a true and correct copy of which is attached as Exhibit E; the declaration of John St. Croix, a true and correct copy of which is attached as Exhibit F; a

Request for Judicial Notice, a true and correct copy of which is attached as Exhibit G; and a Proof of Service, a true and correct copy of which is attached as Exhibit H.

12. The Declaration of Andrew Shen specified that the Ethics Commission had withheld 24 documents on the basis of attorney-client privilege and the attorney work product doctrine. (Exh. E at 104.) Of the 24 documents, 15 constituted requests from the Ethics Commission's staff to the City Attorney's Office for legal advice concerning the proposed regulations. (*Id.*) The nine remaining documents provided legal advice from the City Attorney's Office in response to those requests. (*Id.*) One of the nine documents is a May 6, 2010 memorandum to the Ethics Commission and the Ethics Commission's staff that analyzes the legal issues implicated by the proposed regulations. (*Id.*)

13. On October 15, 2013, Grossman filed his reply, a true and correct copy of which is attached as Exhibit I. In his reply, Grossman responded to the City's principal argument that the Charter prevailed over the Sunshine Ordinance. (Exh. I at 200-01.)

14. In his October 24, 2013 tentative ruling, Judge Goldsmith indicated that he would grant Grossman's petition for a writ of mandate. A true and correct copy of the tentative ruling is attached as Exhibit J. The tentative ruling stated that "Respondents have not met their burden that the withheld documents are exempt under the California Public Records Act and the San Francisco Sunshine Ordinance[]." (Exh. J at 203.) The tentative ruling further stated that under the Sunshine Ordinance, "public records regarding advice on compliance with, analysis of, and opinion concerning liability under, or any communication otherwise concerning the

CPRA or the Sunshine Ordinance are subject to disclosure,” citing section 67.24(b)(1)(iii). (*Id.*)

15. The tentative ruling did not address the City’s principal argument that the Charter establishes that attorney-client privilege and attorney work product applies to the City Attorney’s communications with its clients, and that Sunshine Ordinance section 67.24(b)(1)(iii) is invalid because it is in conflict with the Charter.

16. The matter came on for hearing on October 25, 2013, and the transcript is attached as Exhibit M. Tracking the opposition brief, counsel for the City began by stating, “the crux of the City’s argument in this case with respect to Mr. Grossman’s petition is that the San Francisco charter establishes an attorney-client relationship between the City Attorney and all of the City’s constituent officials and City departments.” (Exh. M at 215 [Transcript at 2:15-19].) The City’s counsel continued by arguing that “the Sunshine Ordinance provision cited by petitioner . . . conflicts with that charter obligation” and is “invalid.” (*Id.* at 218 [Transcript at 5:7-9].) Despite this, Judge Goldsmith stated that he had not addressed the City’s principal argument in his tentative ruling because “the fact that 67.24(b) conflicts with the City charter is just not before me” and was “not on my table.” (*Id.* at 221, 229 [Transcript at 8:7-8, 16:18].) Further, Judge Goldsmith appeared to believe that the Sunshine Ordinance itself was a “charter amendment” rather than a mere ordinance – even though counsel for the City attempted to correct this misunderstanding. (*Id.* at 216-18 [Transcript at 3:20, 4:20-5:1].) At the conclusion of the hearing, Judge Goldsmith took the matter under submission. (*Id.* at 232 [Transcript at 19:6-20].)

17. On October 29, 2013, Judge Goldsmith filed his order granting Grossman's petition for a writ of mandate, attached as Exhibit K. Judge Goldsmith's order reiterated his tentative ruling with one addition, at lines 17-18, stating: "Respondents' request to strike SF Admin. Code §67.24(b)(1)(iii) is denied without prejudice, as the issue is not properly before this Court for the present motion." (Exh. K at 205.)

**F. Basis for Relief By Writ**

18. Government Code section 6259(c) provides an expedited appeal process for actions brought under the California Public Records Act: "an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, . . . shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." Section 6259(c) "expressly authorizes a writ as the sole and exclusive means to challenge the trial court's ruling" in California Public Records Act cases. (*MinCal Consumer Law Group v. Carlsbad Police Department* (2013) 214 Cal.App.4th 259, 263.) The legislative intent of this provision is to ensure that "the determination of the obligation to disclose records requested from a public agency be made expeditiously." (*Id.* at 265 [quotations and citation omitted].)

19. Charter section 6.102 imposes many duties on the City Attorney that require the provision of candid and confidential legal advice to City officials, including:

- "[r]epresent[ing] the City and County in legal proceedings";
- in certain circumstances, "[r]epresent[ing] an officer or official of the City and County";
- if "a cause of action exists in favor of the City and County, commenc[ing] legal proceedings";

- “[u]pon request, provid[ing] advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County”;
- “[m]ak[ing] recommendations for or against the settlement or dismissal of legal proceedings to the Board of Supervisors prior to any such settlement or dismissal”; and
- through a Claims Bureau, “investigat[ing], evaluat[ing] and settl[ing] for the several boards, commissions and departments all claims for money or damages.”

(Exh. G at 183-84 [Charter § 6.102(1)-(5), (9)].) In establishing the City Attorney’s Office and its duties, the voters necessarily intended that the Office carry out those tasks subject to the attorney-client and attorney work product privileges.

20. The Charter also provides that the City Attorney shall be subject to the “duties prescribed by state laws” for the office. (Request for Judicial Notice (“RJN”), Exh. B [Charter § 6.100].) State law imposes duties on the City Attorney – like all attorneys in California – to maintain the confidentiality of attorney-client communications, and to protect attorney-client privileged communications. (*See* Cal. Bus. & Prof. Code § 6068(e)(1); Cal. Evid. Code § 955; Cal. Rule of Prof. Cond. 3-100.)

21. The Charter, by setting forth the City Attorney’s specific duties, also establishes that City officials and departments must have a City Attorney’s Office that can carry out those prescribed responsibilities. Any ordinance impeding the duties assigned to the City Attorney’s Office would therefore conflict with the Charter. (*See Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684, 695-97.)

22. For charter cities such as San Francisco, the charter is the City's "constitution" and the "supreme law of the municipality." (*Michael Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1021.) An ordinance cannot trump an inconsistent provision of the Charter any more than a statute could overrule an inconsistent provision of the Constitution. (*See Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1034.) Under Grossman's reasoning, city agencies would be prevented from receiving confidential written advice from the City Attorney on a wide array of issues. Grossman's argument, if accepted, could prompt further efforts, by *ordinance*, to prevent the City from invoking attorney-client privilege on every other subject on which the City Attorney provides legal advice pursuant to its Charter obligations.

23. The Superior Court's ruling has created uncertainty about the ability of the City Attorney's Office to provide confidential legal advice to its clients. Because the Office provides legal advice on a daily basis and needs to ensure that it is taking proper measures to protect the confidentiality of its advice, the City respectfully requests that the Court promptly adjudicate this matter. To prevent any irreparable harm resulting from the Superior Court's order, the City has also concurrently filed a motion for an immediate stay pursuant to Government Code section 6259(c).

#### G. Prayer

WHEREFORE, Petitioners pray that:

24. The City prays that this Court issue a peremptory writ of mandate and/or prohibition or other extraordinary writ directing the Superior Court to:

- (1) set aside and vacate its order granting a writ of mandate,  
and to enter a new order denying Grossman's petition for a writ of  
mandate;
- (2) order that the City recover its costs incurred; and
- (3) grant other such relief as may be just and proper.

Dated: November 22, 2013

Respectfully submitted,

DENNIS J. HERRERA  
City Attorney  
THERESE M. STEWART  
Chief Deputy City Attorney  
VINCE CHHABRIA  
Chief of Appellate Litigation  
ANDREW SHEN  
JOSHUA S. WHITE  
Deputy City Attorneys

By: s/Andrew Shen  
ANDREW SHEN

Attorneys for Petitioners JOHN ST.  
CROIX, in his official capacity as  
Executive Director of the San Francisco  
Ethics Commission and SAN  
FRANCISCO ETHICS COMMISSION

## VERIFICATION

I, Andrew Shen, declare as follows:

I am an attorney admitted to practice in the State of California. I was appointed to represent petitioners herein.

In my capacity as attorney for petitioners, I am making this verification on their behalf.

I wrote and have read and considered the foregoing Petition for Writ of Mandate/Prohibition and the Memorandum of Points and Authorities are within my knowledge, except as to those matters which are alleged therein on information and behalf and as to those matters, I believe them to be true.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 22nd day of November 2013, at San Francisco, California.

s/Andrew Shen  
ANDREW SHEN

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. BACKGROUND

#### A. The San Francisco Charter Establishes The City Attorney's Office And Its Primary Duties.

The voters structured San Francisco's government through the Charter. The first modern Charter, adopted in 1932, was a ballot measure approved by the voters, and every Charter amendment proposed since then has been decided by the voters at the ballot box. (*See* Cal. Const. art. XI, § 3(a) [requiring voter approval of Charter amendments]; *see generally* Francis V. Keesling, San Francisco Charter of 1931 (1933).)

It is much more difficult for voters to amend the Charter than to enact an ordinance. This is not surprising, since the Charter is the City's foundational governing document. To place a Charter amendment on the ballot, the proponents of the measure must gather the signatures of ten percent of all of San Francisco's registered voters, or approximately 50,000 signatures. (*See* Cal. Elec. Code § 9255(b)(3).) An initiative ordinance requires far fewer signatures: a number equal to five percent of the votes cast for Mayor in the last mayoral election, presently about 9,700 signatures. (*See* RJN, Exh. E [Charter § 14.101].)

Through the Charter process, the voters decided from the very start that San Francisco should have an elected City Attorney charged with representing the City and its officials in legal matters. (*See* Exh. G at 183-85 [Charter § 6.102].) For decades, the elected City Attorney has played this role without any suggestion that the City Attorney's advice to its clients is not privileged.

The Charter lists some of the City Attorney's primary duties. Many of these Charter-mandated duties require that the City Attorney's Office provide candid and confidential legal advice to its clients, in litigation and

non-litigation contexts. Under the Charter, the City Attorney is required to “[r]epresent the City and County in legal proceedings with respect to which it has an interest.” (*Id.* at 183 [Charter § 6.102(1)].) In certain circumstances, the City Attorney must also represent individual City officers and officials in litigation. (*Id.* at 184 [Charter § 6.102(2)].) When “a cause of action exists in favor of the City and County,” the City Attorney may also “commence legal proceedings.” (*Id.* [Charter § 6.102(3)].) The City Attorney is also the legal advisor to the City as a whole, providing oral and written legal advice to the Mayor and Board of Supervisors as well as City officers, department heads, boards and commissions.<sup>1</sup> (*Id.* [Charter § 6.102(4)].) The City Attorney must “[m]ake recommendations for or against the settlement or dismissal of legal proceedings to the Board of Supervisors prior to any such settlement or dismissal.” (*Id.* [Charter § 6.102(5)].) The City Attorney must also review and approve as to form “bonds, contracts and, prior to enactment, all ordinances” as well as “examine and approve title to all real property to be acquired by the City and County.” (*Id.* [Charter § 6.102(6)].) The Charter also requires the City Attorney to establish a Claims Bureau “to investigate, evaluate and settle for the several boards, commissions and departments all claims for money or damages.” (*Id.* [Charter § 6.102(9)].)

In addition to these Charter-imposed duties, the City Attorney is responsible for the City’s other legal affairs, such as drafting proposed legislation (in addition to approving such legislation as to form), reviewing

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<sup>1</sup> The voters have also specifically designated the City Attorney as the legal advisor for certain City bodies. (*See* RJN, Exhs. C-D, F-G [Charter §§ 8A.100 (Municipal Transportation Agency); 13.104.5 (Elections Commission and Department of Elections); 15.102 (Ethics Commission); B3.585 (Port Commission)].)

and drafting regulations, and advising City officials, boards, commissions and departments on all aspects of their operations. (*See* Exh. E at 103.) The City Attorney's role is substantively broad as well. The City Attorney advises and represents the City and its constituent bodies and officials on an array of subjects, including transportation, energy and telecommunications, public utilities, public health, environment and land use, contracts, construction, real estate and finance, law enforcement, health and safety code enforcement, child and family services, ethics and campaign finance, elections, labor and employment, taxation and litigation of all kinds. (*Id.*)

In its role as legal counsel to City departments and officials, the City Attorney provides written advice to City employees and officers, either through formal memoranda or more informal means such as e-mails. (*Id.*) The City Attorney's Office generally provides its advice confidentially. (*Id.*) Communicating with clients in confidence is important because it encourages clients to confide in the City Attorney and provide all information that may be critical to the City Attorney's ability to give thorough and accurate advice. (*Id.*)

**B. The San Francisco Sunshine Ordinance, And The 1999 Amendments Concerning Attorney-Client Communications.**

In 1993, the San Francisco Board of Supervisors enacted the first version of San Francisco's Sunshine Ordinance. (*See* RJN, Exh. A [S.F. Admin. Code §§ 67.1-67.2].) The Sunshine Ordinance establishes the City's obligations to provide public access to meetings of City officials and to respond to requests for public records concerning the City's business, in addition to the requirements set forth by state law. The 1993 version of the

Sunshine Ordinance did not address the confidentiality of attorney-client communications. (*See* Exh. G at 155, 176.)

In 1999, a group of San Francisco voters prepared and advocated for amendments to the Sunshine Ordinance. (*See id.* at 155.) Because the 1999 amendments were a ballot measure, the City Attorney's Office did not draft any of its provisions. (*See* Cal. Gov. Code § 54964 [prohibiting local agencies from using public resources to support a ballot measure campaign].) Nor did the Office approve the 1999 amendments as to form.<sup>2</sup> The proponents of the measure gathered signatures from registered San Francisco voters to place these amendments before the voters, and the measure appeared on the ballot for the November 2, 1999 municipal election. (*See* Exh. G at 155.) The voters approved it. Section 67.24(b)(1)(iii) of the Sunshine Ordinance now provides that “[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning” state and local public meeting, public records, and ethics laws are subject to disclosure. (*See id.* at 176.)

**C. Grossman's Public Records Request To The Ethics Commission For Privileged Materials, And The Documents Withheld.**

The San Francisco Ethics Commission (“Ethics Commission”) is a five-member body that oversees the City's campaign finance, lobbying, conflicts of interest, and governmental ethics laws. (RJN, Exhs. F, H [Charter §§ 15.100, C3.699-10].) The Ethics Commission's Executive Director, John St. Croix, and his staff carry out the department's day-to-day work. (*See id.*, Exh. F [Charter § 15.101].)

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<sup>2</sup> Approval “as to form” means that the legislation is in the proper format and that the substance of the proposal is not patently unconstitutional or otherwise clearly illegal.

The Sunshine Ordinance designates the Ethics Commission as one of the bodies with authority to enforce that Ordinance. (*See* RJN, Exh. A [S.F. Admin. Code §§ 67.34, 67.35(d)].) However, the Sunshine Ordinance does not specify the procedures that govern the Ethics Commission's adjudication or enforcement of complaints alleging Sunshine Ordinance violations. After a multi-year process, at its September 14, 2012 meeting the Ethics Commission first considered the adoption of final regulations for its handling of complaints alleging violations of the Sunshine Ordinance.<sup>3</sup> (*See* Exh. F at 107.)

On October 3, 2012, Grossman submitted a public records request under the California Public Records Act and the Sunshine Ordinance for documents relating to the Ethics Commission's Sunshine Ordinance regulations. (*See* Exh. A at 6, 19-20.) His request sought all drafts of the regulations, a September 14, 2012 staff report regarding the regulations, and all documents relating to "the preparation, review, revision and distribution of all prior drafts and final versions of the Draft Regulation and Staff Report, including, without limitation, emails, memoranda, notes, letters or other correspondence or communications to or from" the City Attorney's Office. (*Id.*)

On October 12, 2012, the Ethics Commission responded to Grossman's request, producing 127 documents, six of which were partially redacted. (*Id.* at 22-23, 50.) As explained in its response, the Ethics Commission withheld other documents in their entirety based on attorney-

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<sup>3</sup> The Ethics Commission concluded its review of the proposed regulations and adopted them at its November 26, 2012 meeting. (*See* Exh. F at 107.)

client privilege and work product, citing Evidence Code sections 952 and 954 and Code of Civil Procedure section 2018.030. (*Id.* at 22-23.)

On September 18, 2013, Grossman filed his petition for writ of mandate in the Superior Court. (*Id.* at 1-56.) In the course of litigating this matter, the City Attorney's Office specified that the Ethics Commission has withheld 24 documents subject to attorney-client privilege and attorney work product protection. (Exh. E at 104.)

**D. The Superior Court's Ruling On Grossman's Petition For A Writ Of Mandate.**

Superior Court Judge Ernest H. Goldsmith issued his tentative ruling on October 24, 2013. In it, Judge Goldsmith indicated that he would grant Grossman's petition for a writ of mandate. (Exh. J at 203.) The tentative ruling stated that "Respondents have not met their burden that the withheld documents are exempt under the California Public Records Act and the San Francisco Sunshine Ordinance[]." (*Id.*) The tentative ruling further stated that under the Sunshine Ordinance, "public records regarding advice on compliance with, analysis of, and opinion concerning liability under, or any communication other wise concerning the CPRA or the Sunshine Ordinance are subject to disclosure," citing section 67.24(b)(1)(iii). (*Id.*)

The tentative ruling did not address the City's principal argument that the Charter establishes that attorney-client privilege and attorney work product applies to the City Attorney's communications with its clients, and that section 67.24(b)(1)(iii) is invalid because it conflicts with the Charter. (*See id.*) This argument was the subject of the first paragraph of the introduction to the City's brief, and appeared in the discussion section at pages five through nine. (Exh. D at 87, 91-95.)

At the hearing, counsel for the City began by stating, “the crux of the City’s argument in this case with respect to Mr. Grossman’s petition is that the San Francisco charter establishes an attorney-client relationship between the City Attorney and all of the City’s constituent officials and City departments.” (Exh. M at 215 [Transcript at 2:15-19].) The City’s counsel continued, “the Sunshine Ordinance provision cited by petitioner . . . conflicts with that charter obligation” and is “invalid.” (*Id.* at 218 [Transcript at 5:7-9].) Despite this, Judge Goldsmith stated that he had not addressed the City’s principal argument in his tentative ruling because “the fact that 67.24(b) conflicts with the City charter is just not before me” and was “not on my table.” (*Id.* at 221, 229 [Transcript at 8:7-8, 16:18].) Further, Judge Goldsmith appeared to believe that the Sunshine Ordinance itself was a “charter amendment” rather than a mere ordinance – even though counsel for the City attempted to correct this misunderstanding. (*Id.* at 216-18 [Transcript at 3:20, 4:20-5:1].) At the conclusion of the hearing, Judge Goldsmith took the matter under submission. (*Id.* at 232 [Transcript at 19:6-20].)

On October 29, 2013, Judge Goldsmith issued his order granting Grossman’s petition for a writ of mandate. Substantively, the order reiterated the tentative ruling with one addition, at lines 17-18, stating: “Respondents’ request to strike SF Admin. Code §67.24(b)(1)(iii) is denied without prejudice, as the issue is not properly before this Court for the present motion.” (Exh. K at 205.)<sup>4</sup>

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<sup>4</sup>The idea that the City requested the Court to “strike” a portion of the Sunshine Ordinance is not precisely accurate. The City, as respondent, argued that the Court should not grant the writ seeking to require production of privileged documents because the provision of the Ordinance purporting to abrogate the privilege is trumped by the Charter.

## II. ARGUMENT

### A. Through The San Francisco Charter, The Voters Established That The Attorney-Client Privilege And Attorney Work Product Applies To The City Attorney's Office's Communications With Its Clients.

For charter cities such as San Francisco, the charter is the “local constitution” and the “supreme law of the municipality.” (*Michael Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1021.) A charter city “may not act in conflict with its charter,” and “[a]ny act that is violative of or not in compliance with the charter is void.” (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171.) Only the voters may adopt a charter for their city, and only the voters may make further amendments to a charter. (Cal. Const. art. XI, § 3(a).) San Francisco voters have exercised this charter power to establish the City Attorney’s Office and its responsibilities to protect client confidences, including attorney-client privileged communications and attorney work product.

To interpret a city charter, courts should “construe the charter in the same manner as . . . a statute.” (*Domar Electric*, 9 Cal.4th at 171.) The court’s “sole objective is to ascertain and effectuate legislative intent.” (*Id.* at 172.) To determine the voters’ intent, courts should “look first to the language of the charter, giving effect to its plain meaning.” (*Id.*) In examining the charter’s language, “each sentence must be read not in isolation but in light of the statutory scheme.” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

In creating the City Attorney’s Office through the Charter, San Francisco voters intended that the City Attorney would be able to provide confidential legal advice to City departments and officials. The key language is in Charter sections 6.102 and 6.100. Section 6.102 lists the

duties of the City Attorney, and under section 6.100 the City Attorney must carry out those duties subject to the professional obligations that apply to all California attorneys. The duties that the voters imposed on the City Attorney's Office in section 6.102 necessarily evince an intent that the attorney-client privilege and attorney work product apply to the Office's legal advice. Further, in enacting Charter section 6.100, the voters provided that the City Attorney was subject to the duties "prescribed by state law" for that office. The applicable duties include the duty of the public lawyers to protect client confidences and privileged legal advice.

1. **In establishing the City Attorney's specific duties, the voters necessarily intended that the City Attorney's advice to clients would be confidential and privileged.**

In interpreting statutes, courts have recognized that "whatever is necessarily implied in a statute is as much part of it as that which is expressed." (*Johnston v. Baker* (1914) 167 Cal. 260, 264; cf. *Trimont Land Co. v. Truckee Sanitary Dist.* (1983) 145 Cal.App.3d 330, 349 [courts should not presume that lawmakers "intend[] to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication"].) Court have applied this rule of necessary implication to city charters. (*See Currier v. City of Roseville* (1970) 4 Cal.App.3d 997, 1001 [interpreting charter as necessarily implying that certain probationary employees have right to notice and hearing prior to termination].) Because confidentiality is well-understood to apply to the attorney-client relationship and because it is fundamental to that relationship, the voters necessarily intended that the privilege apply to the City Attorney's advice.

In a similar context, the California Supreme Court held that statutes regarding the representation of clients in welfare benefits proceedings necessarily included basic confidentiality protections. In *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766, the Court considered whether Welfare and Institutions Code section 10950 created a confidentiality privilege for applicants where lay persons, rather than lawyers, represented them in their efforts to obtain welfare benefits. Section 10950 provides that applicants for welfare benefits may appear through an “authorized representative” who may be either an attorney or a layperson. (*Id.* at 770.) The Supreme Court held that in enacting section 10950 – even though it did not explicitly discuss any privileges – the Legislature necessarily intended to protect confidentiality: “Suffice it to say that the considerations which support the privilege are so generally accepted that the Legislature must have implied its existence as an integral part of the right to representation by lay persons.” (*Id.* at 771.) Section 10950 necessarily implied “a guarantee of confidentiality in its extension of the right of representation.” (*Id.* at 772.)

The same analysis applies more strongly here, because unlike lay persons’ communications, attorneys’ communications with clients pertaining to legal advice have been treated as confidential under the attorney-client privilege, which was recognized as far back as the reign of Elizabeth I. (*See E. Imwinkelried, The New Wigmore: Evidentiary Privileges* § 2.2 (Aspen Pub.); *see also Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 380 [“The attorney-client privilege has a venerable pedigree that can be traced back 400 years.”].) “Protecting the confidentiality of communications between attorney and client is fundamental to our legal system,” and the privilege that applies to those communication is a “hallmark of our jurisprudence.” (*People v. Speedee Oil Change Systems,*

*Inc.* (1999) 20 Cal.4th 1135, 1146.) “The attorney-client privilege is based on grounds of public policy and is in furtherance of the proper and orderly functioning of our judicial system, which necessarily depends on the confidential relationship between the attorney and the client.” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1207.) The attorney-client privilege allows clients to share all relevant facts with their counsel, and counsel to be equally frank in providing clients with legal advice. “[B]y encouraging complete disclosures, the attorney-client privilege enables the attorney to provide suitable legal representation.” (*Id.*; see also *Hunt v. Blackburn* (1888) 128 U.S. 464, 470 [“The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”].)

In the proceeding below, Grossman argued that attorney-client privilege is unnecessary for public law offices, and cited California Government Code section 54956.9(b) (the Brown Act) as support for that proposition. (Exh. I at 195-96.) But section 54956.9 *explicitly* abrogates attorney-client privilege, and does so only for communications that take place in public meetings, with certain exceptions.<sup>5</sup> And except for this express abrogation, attorney-client communications remain privileged, by default. Therefore, section 54956.9(b) only supports the City’s position

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<sup>5</sup> Government Code section 54956.9(b) provides: “For purposes of this chapter, all expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter.”

that absent an express abrogation in the Charter, the privilege necessarily applies to the City Attorney's Charter-conferred duties.

Indeed, the California Supreme Court rejected an argument similar to Grossman's in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363. There, a member of the public demanded disclosure of a memorandum provided by the city attorney to city council members in connection with a public meeting concerning approval of a parcel map. The petitioner contended that section 54956.9 abrogated the privilege not only as to public meetings but also for written communications pertaining to such meetings. The Court of Appeal had agreed with the petitioner, reasoning that absent pending litigation, for which there was an exception, the privilege wasn't necessary because "the public is not the adversary of the public agency and there is no need for secrecy between them." (*Id.* at 369.)

The California Supreme Court reversed, rejecting that argument. It held that the abrogation of the privilege contained section 54956.9 was expressly "for the purpose of the *open meeting* requirements of the Brown Act," whereas "written matter sent from attorney to governmental client is regulated by the *Public Records Act* and not this section." (*Id.* at 377 [emphases in original].) The Court declined to interpret the section as repealing the attorney-client privilege "by implication." (*Id.* at 378-79.) The Court also observed that while "[o]pen government is a constructive value in our democratic society," the attorney-client privilege is "vital to the effective administration of justice." (*Id.* at 380.) Moreover, it affirmed that local government "needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel, even though the scope of confidential meetings is limited by this state's public meeting requirements." (5 Cal. 4th

at 380; *see also* *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 913 [similar considerations apply to attorney work product doctrine].) Thus, open meeting laws notwithstanding,

[t]here is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned. . . . Several California decisions recognize that the attorney-client privilege is as vital to public as to private clients.

(*Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs* (1967) 255 Cal.App.2d 51, 54, mod. & affd. *Roberts*, 5 Cal.4th at 380.)

Thus, the attorney-client privilege and attorney work product protection are presumed to be an integral part of the City Attorney's functions as prescribed in the Charter. To take but one practical example, the Charter requires the City Attorney's Office to make recommendations to the Board of Supervisors about settlement or dismissal of pending litigation. (Exh. G at 184 [Charter § 6.102(5)].) This would be an impossible task if the City Attorney could not provide such recommendations in confidence. By providing the Board of Supervisors with its view of the strengths and weaknesses of the City's position, the best and worst facts revealed through discovery and its analysis of the relevant case law, the City Attorney would be providing the same information to the City's adversary, who could then use it against the City in the same or similar litigation. To read the Charter as not incorporating the privilege would require the Court to assume that the voters "intended that the only sound advice the [City Attorney] could give was, 'Don't talk to me.'" (*Welfare Rights Org.*, *supra*, 33 Cal.3d at 771 n.3.)

2. **In the Charter, the voters additionally provided that the City Attorney's Office is subject to the duties of confidentiality imposed by state law.**

Section 6.100 provides that the City Attorney is subject to the “duties prescribed by state laws.” (*See* RJN, Exh. B.) The State Bar Act requires an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” (Cal. Bus. & Prof. Code § 6068(e)(1).) The Rules of Professional Conduct similarly prohibit an attorney from revealing confidential client information without the client’s informed consent. (Cal. Rule of Prof. Cond. 3-100.) The confidential information subject to these duties includes all “matters communicated in confidence by the client” including, but not limited to, communications “protected by the attorney-client privilege” and “matters protected by the work product doctrine.” (*See* Cal. Rule of Prof. Cond. 3-100, note 2; *see also* Cal. State Bar Formal Opn. 2003-161 [“The attorney’s ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is broader than the attorney-client privilege.”].) In addition, California Evidence Code section 955 provides that an attorney “who received or made a communication subject to the attorney-client privilege ‘shall claim the privilege whenever he is present when the communication is sought to be disclosed.’” (*See, e.g., People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 713.)

It is well-established that public sector attorneys are subject to the provisions of the State Bar Act and “[a]ll members of the State Bar of California, including those who represent governmental entities, are governed by the Rules of Professional Conduct.” (*See* Cal. State Bar Formal Opn. 2001-156.) These state law duties apply to all public lawyers in California. (*See, e.g., City and County of San Francisco v. Cobra*

*Solutions, Inc.* (2006) 38 Cal.4th 839, 846 [duty of confidentiality applies to San Francisco City Attorney]; *Santa Clara County Counsel Attys. Assoc. v. Woodside* (1994) 7 Cal.4th 525, 545-48 [applying Rules of Professional Conduct to county counsel]; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 156-57 [California Attorney General is “bound by the rules that control the conduct of other attorneys in the state,” such as duty of confidentiality]; *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 32-33 [analyzing county counsel’s purported conflict of interest under the Rules of Professional Conduct].)

In enacting Charter section 6.100, the voters incorporated compliance with the State Bar Act, the Rules of Professional Conduct, and relevant provisions of the California Evidence Code into the City Attorney’s Office’s duties. By referencing these state law duties, the voters intended that the City Attorney’s Office’s communications to and from its clients would be privileged and confidential.

**B. As An Ordinance, The Local Sunshine Law Cannot Limit The Confidentiality And Privilege Afforded By The Charter To Attorney-Client Communications.**

For Charter cities, “a charter bears the same relationship to ordinances that the state Constitution does to statutes.” (*Citizens for Responsible Behavior*, 1 Cal.App.4th at 1034.) As a statute cannot amend a constitution, “an ordinance cannot alter or limit the provisions of a city charter.” (*Id.*) For this reason, the San Francisco Charter preempts any conflicting local ordinance. Consequently, the Charter’s establishment of attorney-client privilege and attorney work product trumps section 67.24(b)(1)(iii) which invalidly purports to make such communications subject to public disclosure. Because the Charter imports attorney-client

and work product privileges, only a Charter amendment could eliminate the ability of either the City Attorney or his City and County clients from invoking those privileges.

In providing its legal advice regarding the draft regulations at issue in this case, the City Attorney's Office was performing one of its Charter duties subject to the attorney-client privilege and work product protection. Through the deputies assigned to the Ethics Commission, the Office was "[u]pon request, provid[ing] advice or written opinion" to a City department. (Exh. G at 184 [Charter § 6.102(4)].) In seeking that advice, the Ethics Commission was exercising its right under the Charter to request such advice. Grossman's insistence that he is entitled to these communications, relying on section 67.24(b)(1)(iii), contravenes Charter sections 6.102 and 6.100 and the confidentiality that the voters intended to protect for communications requesting and providing legal advice.

In the proceedings below, Grossman virtually ignored the City's argument that Sunshine Ordinance section 67.24(b)(1)(iii) is void because it conflicts with the Charter, dedicating one paragraph to the issue at the very end of his reply brief. In that paragraph, Grossman argued that: (i) the California Public Records Act authorizes local governments to provide for even more generous disclosure of public records than state law contemplates; and therefore (ii) section 67.24(b)(1)(iii) may permissibly conflict with the City Charter. (*See* Exh. I at 200.) This is a non-sequitur. Although it is true that local governments are *authorized* to adopt public records laws that are more generous with respect to disclosure than the Public Records Act itself, that does not mean cities are authorized to contradict their charters by mere ordinance. If a city charter prevents a city

from accomplishing something authorized by state law, the answer is to amend the charter, not to enact an ordinance that violates the charter.

**C. The Disputed Provision Of The Sunshine Ordinance Would Impermissibly Interfere With The City Attorney's Charter-Mandated Duties.**

The confidentiality of attorney-client communications is not the only right conferred by the Charter upon the City Attorney's clients. The Charter, by setting forth the City Attorney's duties, necessarily assumes that City officials and departments will have a City Attorney's Office that can effectively carry out those prescribed responsibilities. Any ordinance impeding the duties assigned to the City Attorney's Office would therefore conflict with the Charter. The provision of the Sunshine Ordinance invoked by Grossman is invalid for this independent reason as well.

In *Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684, the Court of Appeal considered whether a budget resolution adopted by the San Bernardino city council impermissibly violated the city charter by eliminating funding for the only two investigator positions in its city attorney's office. San Bernardino's charter established a city attorney's office and prescribed a duty on the part of the office to conduct investigations. (*Id.* at 686.) The petitioner argued that the proposed removal of that personnel would prevent the city attorney's office from carrying out its charter-mandated duty to perform investigations. (*Id.* at 687.) The Court of Appeal agreed and held that the city council could not impair the city attorney's charter duties through a budget ordinance. (*Id.* at 695-97.) Only the voters could change the city attorney's duties by amending the city's charter.

The same analysis applies here, because the abrogation of the privilege significantly impedes the City Attorney's functions. If a proposed ethics ordinance presents significant legal issues, the City Attorney's Office will provide its advice regarding the legal risks in a confidential memorandum. The City Attorney's Office could not do this absent the privilege, because the memorandum would give a roadmap to a prospective plaintiff to challenge the legality of the ethics legislation. If Grossman's argument were correct, the City Attorney's Office could not provide the 11-member Board of Supervisors with a legal memorandum addressing the potential legal issues and risks presented by a proposed ordinance – thus interfering with its Charter-mandated duty to provide such advice. (*See* Exh. G at 184 [Charter § 6.102(4)].) In such a circumstance, the City Attorney could not provide candid or thorough legal advice, possibly frustrating the efforts of the Board of Supervisors to address an ethics issue facing the City and to explore alternate vehicles to achieve its policy objectives.

Similarly, if Grossman's position were correct, the City Attorney could not effectively defend City boards and officials in litigation about ethics, open meeting or public records matters, since the City Attorney's communications with the officials or bodies whose conduct was claimed to violate those laws would be open to the City's opponents in the litigation. Nor could the City Attorney effectively carry out his duty to advise City officials and boards about those laws since the possibility of receiving advice that a city actor's course of conduct entailed some legal risk – advice that an adversary would be entitled to review – would discourage officials from ever seeking such advice in the first instance. Of course, the City Attorney could refrain from ever putting such advice in writing, but this

would be unworkable, since advice about ethics, public records, and open meetings laws can be complicated and fact-dependent.

Lastly, if voters could withdraw the privilege by ordinance in regard to the matters mentioned above, why could they not do the same for any subject on which the City Attorney advises City officials? If, for example, a group of residents disagreed with the City Attorney's defense of cases against City police officers, Grossman's argument would seem to allow them to legislate that the City Attorney must turn over its work product and advice on such litigation to the City's adversaries. But police officers are entitled to an effective defense – something that cannot happen without the attorney-client privilege. And overall, under the Charter, the City Attorney's clients are entitled to confidentiality. The idea that this confidentiality could be totally obliterated by ordinance makes no sense.

### III. CONCLUSION

In the Charter, the voters established the City Attorney as an elected office, enumerated the primary duties of the Office, and in listing those duties, necessarily intended that attorney-client privilege and attorney work product applied to the Office's communications with its clients. While the voters later adopted amendments to the Sunshine Ordinance, including section 67.24(b)(1)(iii), such an initiative ordinance must yield to the

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///

///

Charter. The Superior Court failed to heed this legal truism and its order granting the petition for a writ of mandate should therefore be reversed.

Dated: November 22, 2013

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### CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 8,304 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 22, 2013.

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## PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102.

On November 22, 2013, I served the following document(s):

**PETITION FOR PEREMPTORY WRIT OF  
MANDATE AND/OR PROHIBITION  
[CALIFORNIA GOVERNMENT CODE  
SECTION 6259(c)]**

on the following persons at the locations specified:

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Judge Ernest H. Goldsmith  
San Francisco County Superior Court  
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Court of Appeal  
350 McAllister Street  
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[original and three copies]  
[via hand delivery]

California Supreme Court  
[Submitted Electronically Through the  
Court Of Appeal E-Submission]

in the manner indicated below:

- ☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed November 22, 2013, at San Francisco, California.

s/Pamela Cheeseborough  
Pamela Cheeseborough

Case No. A140308

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

---

JOHN ST. CROIX, EXECUTIVE DIRECTOR, SAN FRANCISCO  
ETHICS COMMISSION; and SAN FRANCISCO ETHICS COMMISSION,

*Petitioners and Respondents,*

v.

SUPERIOR COURT OF CALIFORNIA FOR THE CITY  
AND COUNTY OF SAN FRANCISCO,

*—Respondent and Appellant—*

---

ALLEN GROSSMAN,

*Real Party in Interest.*

---

Appeal from the Superior Court of San Francisco,  
Case No. CPF13513221  
The Honorable Ernest H. Goldsmith

---

**OPPOSITION TO PETITION FOR PEREMPTORY WRIT OF  
MANDATE AND/OR PROHIBITION [CALIFORNIA  
GOVERNMENT CODE SECTION 6259(C)]**

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## TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First APPELLATE DISTRICT, DIVISION One	Court of Appeal Case Number: A140308
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Michael Ng (237915); Jasmine Singh (260318) — Kerr & Wagstaffe LLP 100 Spear Street, 18th Floor San Francisco, California, 94105 TELEPHONE NO: 415-371-8500 FAX NO (Optional): 415-371-0500 E-MAIL ADDRESS (Optional): mng@kerrwagstaffe.com; singh@kerrwagstaffe.com ATTORNEY FOR (Name): Real Party in Interest, Allen Grossman	Superior Court Case Number: CPF13513221 FOR COURT USE ONLY
APPELLANT/PETITIONER: John St. Croix et.al.	
RESPONDENT/REAL PARTY IN INTEREST: Superior Court of San Francisco	
<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b> (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.	

1. This form is being submitted on behalf of the following party (name): Real Party in Interest, Allen Grossman2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:Full name of interested  
entity or personNature of interest  
(Explain):

(1)

(2)

(3)

(4)

(5)

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 23, 2013

Michael K. Ng.

(TYPE OR PRINT NAME)

SIGNATURE OF PARTY OR ATTORNEY

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## I. INTRODUCTION

The dispute here arises out of a proper public records request by Real Party in Interest Allen Grossman (“Grossman”) to the San Francisco Ethics Commission and its Executive Director (collectively, “Petitioners”) pursuant to the California Public Records Act, Government Code sections 6250 *et seq.* (the “CPRA”) and the San Francisco Sunshine Ordinance, San Francisco Administrative Code sections 67.1 *et seq.* (the “Sunshine Ordinance”). The requested records relate to the Ethics Commission’s drafting of proposed regulations governing the handling of Sunshine Ordinance Task Force referrals and direct complaints filed with the Ethics Commission under the Sunshine Ordinance.

The CPRA permits a locality to “adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set out in [the CPRA.]” (Gov. Code, § 6253, subd. (e).) The Sunshine Ordinance, adopted by an overwhelming majority of San Francisco voters in 1999, does exactly that, by providing greater access to San Francisco’s public records and meetings. Of pertinence here, the Sunshine Ordinance provides that “[n]otwithstanding a department’s legal discretion to withhold certain information under the California Public Records Act,” upon request a San Francisco agency must produce “[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records

Act ... any San Francisco governmental ethics code, or this Ordinance [*i.e.*, the Sunshine Ordinance].” (San Francisco Admin. Code, § 67.24, subd. (b)(1).) (See Request for Judicial Notice in Support of Opposition to Petition for Peremptory Writ of Mandate (“RJN”), Ex. 1.)

Though all records requested by Grossman fall within the scope of that section, Petitioners refused to produce certain responsive communications with the San Francisco City Attorney’s Office, invoking the CPRA’s exemption for attorney-client privilege and attorney work product. Petitioners argue that Sunshine Ordinance section 67.24(b) is invalid because it conflicts with the general appointment in the Charter of San Francisco City and County (“City Charter”) of the City Attorney as counsel for San Francisco agencies and officers. In essence, Petitioners contend that merely by naming an attorney for the city, the City Charter implicitly requires that all communications with that attorney must be confidential, notwithstanding the voters’ specific mandate to the contrary.

That novel invalidation theory fails both legally and as a matter of basic logic. There is no conflict between the *general* naming of the City Attorney as counsel and a *specific* requirement that certain communications with the City Attorney remain publicly accessible. Not all communications between an attorney and his or her client are confidential—those that were never confidential in the first place are not protected by privilege. That an attorney has an obligation to protect confidential communications with a

client does not shield expressly public communications with the attorney from public access laws. Petitioners would have the Court impose a rule that having appointed the City Attorney to act for their public officials, the voters of San Francisco cannot require that certain communications between the attorney and those officials be public. There is no legal basis for that claim. Public attorneys often provide advice in public forums, including meetings that state law mandate be open, and there is nothing inherent to the provision of legal advice that *requires* that it can only be administered confidentially.

In light of California's constitutional mandate that laws be construed in favor of the public's right of access, the Court should not take the extreme step of invalidating this important provision of the Sunshine Ordinance, especially in these circumstances where Petitioners have not and cannot show that disclosure would undermine the attorney-client relationship. Grossman respectfully requests that this Petition be denied and that Petitioners be compelled to make the requested public records immediately available.

## **II. FACTUAL BACKGROUND**

### **A. THE PARTIES**

Grossman is a longtime San Francisco resident and an advocate for open government. For many years, he has worked with other open government advocates to push for full implementation of the Sunshine

Ordinance and greater access to public records in San Francisco. The Ethics Commission is organized under Article XV of the City Charter and is a local agency within the meaning of Government Code section 6252(b) of the CPRA. The Ethics Commission consists of five members, who appoint an Executive Director, who serves as the Commission's chief executive. (City Charter, §§ 15.100, 15.101.) (See RJN, Ex. 2.) Petitioner John St. Croix ("St. Croix") is, and at all relevant times has been, the Ethics Commission's Executive Director.

**B. THE SUNSHINE ORDINANCE AND ETHICS COMMISSION REGULATIONS**

Pursuant to CPRA Government Code section 6253(e), the voters of San Francisco adopted the Sunshine Ordinance in November 1999; it took effect in January 2000. Among other things, the Sunshine Ordinance enhances San Franciscans' rights of access to public records and public meetings. It also established the Sunshine Ordinance Task Force to implement and carry out certain aspects of the law and the CPRA.

In addition to its substantive provisions, the Sunshine Ordinance sets out the process for enforcement of that law within San Francisco government. The Ethics Commission plays a critical role in that enforcement regime. For example, the Sunshine Ordinance specifically authorizes persons to enforce that law by instituting proceedings "before the Ethics Commission if enforcement action is not taken by a city or state

official 40 days after a complaint is filed.” (San Francisco Admin. Code, § 67.35, subd. (d)) (See RJN, Ex. 1.) It also instructs that “[c]omplaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission.” (*Id.* at § 67.34.)

Further, because the Sunshine Ordinance Task Force has no independent enforcement power, the Sunshine Ordinance provides that the Sunshine Ordinance Task Force “shall make referrals to a municipal office with enforcement power under this ordinance ... whenever it concludes that any person has violated any provisions of this ordinance or the Acts.” (San Francisco Admin. Code, § 67.30, subd. (c).) (See RJN, Ex. 1.) The Ethics Commission is the only such office, and is specifically given the power to enforce willful violations of the Sunshine Ordinance. (*Id.* § 67.35, subd. (d).) (See *Id.*) In addition, the 1996 voter-adopted City Charter authorizes the Ethics Commission to adopt “rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records.” (City Charter, § 15.102.) (See RJN, Ex. 2.)

Despite that important voter-mandated role, the Ethics Commission has failed to enforce the Sunshine Ordinance. Since 2004, when the Sunshine Ordinance Task Force first referred a failure by a City

respondent to comply with its order to disclose public records, it has referred some 39 such cases to the Ethics Commission for enforcement. In each instance, the Ethics Commission declined to enforce the Order and dismissed the case. Grossman and other Sunshine Ordinance advocates have long criticized that lack of action by the Ethics Commission, as has a San Francisco civil grand jury in its 2010-2011 report, "San Francisco's Ethics Commission: The Sleeping Watch Dog."<sup>1</sup>

A major point of contention was the Ethics Commission's reliance on inapposite regulations in its investigation and enforcement of Sunshine Ordinance referrals. From 2000, when the Sunshine Ordinance became effective, until January 2013, the Ethics Commission had not adopted any specific regulations setting out the procedures for enforcement of Sunshine Ordinance violations. Instead, the Ethics Commission took the position that previously adopted regulations ("Ethics Commission Regulations for Investigations and Enforcement Proceedings") governing other types of investigations should also be applied to Sunshine Ordinance referrals. Those regulations, however, were adopted under a Charter provision for Ethics Commission investigations and enforcements "relating to campaign finance, lobbying, conflicts of interest and governmental ethics." (City

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<sup>1</sup> Available online at <http://www.sfcourts.org/Modules/ShowDocument.aspx?documentid=2860>.

Charter, § 15.102; Appendix C, § C3.699-13.) (See RJN, Ex.2.) Grossman and others argued to the Ethics Commission that those regulations did not govern its Sunshine Ordinance enforcement actions, and that the Ethics Commission needed new separate regulations tailored to the investigation and enforcement of Sunshine Ordinance actions.

In 2009, the Ethics Commission recognized the need for Sunshine Ordinance-specific regulations, and its staff began the process of drafting separate regulations governing (a) the enforcement of Sunshine Ordinance Task Force referrals of its Orders and (b) complaints filed directly with the Ethics Commission regarding willful violations of the Sunshine Ordinance. The development of those regulations extended over three years and, in the end, new regulations were not put in place until January 2013. The first drafts of the new regulations proposed by the Ethics Commission's staff merely would have modified the existing Ethics Commission Regulations for Investigations and Enforcement Proceedings to accommodate Sunshine Ordinance matters. Later, when it became evident that modification would not be workable, the Ethics Commission took a different approach and its staff began drafting stand-alone regulations, which, in their final form, were called "Ethics Commission Regulations for Violations of the Sunshine Ordinance."

For most of that long process, the Ethics Commission staff shared drafts of the new regulations with the Sunshine Ordinance Task Force,

which provided comment and suggestions prior to or in connection with consideration of the draft by the Ethics Commission itself. There were also three joint meetings between the Ethics Commission and members of the Sunshine Ordinance Task Force Committee with responsibility for reviewing the proposed regulations. That collaboration provided the Ethics Commission access to the expertise of the Sunshine Ordinance Task Force, and allowed the Sunshine Ordinance Task Force input into the implementation of the Ethics Commission's important role in enforcement of its referrals.

In late 2012, for unknown reasons, that changed. On September 14, 2012, without prior notice to the Sunshine Ordinance Task Force or its members, the Ethics Commission published notice that its staff had submitted another revised draft of the proposed regulations for consideration at the Ethics Commission's September 24, 2012 meeting. The lack of prior notice deprived the Sunshine Ordinance Task Force of the opportunity to provide input to the Ethics Commission or its staff. Moreover, because the Sunshine Ordinance Task Force did not have a scheduled meeting before the Ethics Commission was set to consider the proposed regulations, it was prevented from taking official action to review or comment on them.

Grossman and other advocates appeared at the Ethics Commission's September 24, 2012 meeting and objected to the Sunshine Ordinance Task

Force's exclusion from the process, without avail.

### C. GROSSMAN'S RECORD REQUEST

In an effort to seek further information about the Ethics Commission's proposed draft for its September 2012 meeting and its failure to provide that draft to the Sunshine Ordinance Task Force for review, on October 3, 2012, Grossman submitted to St. Croix, in his capacity as Executive Director of the Ethics Commission, a public records request pursuant to the CPRA and Sunshine Ordinance seeking copies of certain public records relating to the Ethics Commission's draft regulations. Specifically, Grossman requested:

[C]opies of any and all public records ... in the custody or control of, maintained by or available to you, the Ethics Commission (Commission), any staff member or any Commissioner in connection with or with reference to:

(1) All prior drafts and final versions of (a) the September 14, 2012 draft of the Ethics Commission's regulations governing the handling of complaints related to alleged violations of the Sunshine Ordinance and referrals from the Sunshine Ordinance Task Force ("Draft Amendments") and (b) the September 14, 2012 staff report ("Staff Report") referred to in the [September 14, 2012] Commission Notice [and]

(2) the preparation, review, revision and distribution of all prior drafts and final versions of the Draft Regulations and Staff Report ....

(Exhibits in Support of Petition for Writ of Mandate and for Prohibition ("Petition Exhibits"), p. 19.)

On October 12, 2012, the Ethics Commission responded to Grossman's request and produced 123 electronic files, six of which were partially redacted. However, it informed Grossman that additional records were being withheld:

We are withholding other documents in their entirety, pursuant to California Government Code section 6254(k); California Evidence Code sections 952, 954; and California Code of Civil Procedure section 2018.030.

(Petition Exhibits, pp. 22-23.) The withheld public records were not identified in any way, including by category, and included no information about the number of records withheld. The statutory sections cited in the Ethics Commission's letter define the attorney-client privilege (Evid. Code, §§ 952, 954), and the attorney work product protection (Code Civ. Proc., § 2018.030). The CPRA provision cited, Government Code section 6254(k), is not a privilege or exemption in itself but incorporates into the CPRA exceptions privileges, such as the above two, set out elsewhere in state or federal law.

On October 21, 2012, Grossman responded by letter challenging the Ethics Commission's blanket assertion of privilege in support of its refusal to produce the withheld records. (Petition Exhibits, pp. 25-28.) Having received no response, he sent a follow-up email on November 1, 2012 requesting attention to his previous inquiry. (*Id.*, p. 30.) On November 2, 2012, St. Croix answered Grossman's email, stating that all responsive

documents had been produced: “You have already received all documents responsive to your request.” (*Id.*, p. 32.)

**D. GROSSMAN’S COMPLAINT AND THE SUNSHINE ORDINANCE TASK FORCE ORDER**

Faced with St. Croix’s refusal to produce the requested public records, or to provide the required written justification for his assertion of privilege, Grossman filed a complaint against St. Croix with the Sunshine Ordinance Task Force on November 19, 2012. (Petition Exhibits, pp. 34-48.)

St. Croix responded to the Complaint by letter dated December 6, 2012. (Petition Exhibits, pp. 50-53.) In that response, St. Croix again claimed the attorney-client privilege and attorney work product protection, and asserted that his bare citation to the code sections setting out those privileges was sufficient to satisfy compliance with the Sunshine Ordinance’s requirements for a written justification for any withholding. The Sunshine Ordinance Task Force conducted a hearing on the complaint at its June 5, 2013 public meeting, at which both Grossman and St. Croix appeared, spoke, and responded to questions from Task Force members. St. Croix testified that he did not know the number of records withheld, that he did not personally review them, and that he could not testify regarding which of those claimed exemptions would apply to any or which withheld record.

In a written Order of Determination dated June 24, 2013, the Sunshine Ordinance Task Force held that St. Croix violated Sections 67.21 (b) and 67.24(b)(1) of the Sunshine Ordinance by improperly withholding records subject to disclosure, and ordered him to produce them to Grossman. (Petition Exhibits, pp. 55-56.) St. Croix did not comply with that order. (*Id.*, p. 9, line 20.)

On November 21, 2013, the Sunshine Ordinance Task Force referred Mr. St. Croix's non-compliance with its June 24, 2013 Order to the Ethics Commission. To date, the Ethics Commission has not acted on it. (See RJN, Ex. 5 [Agendas and minutes from Ethics Commission meetings from June 24, 2013 through present].)

During the pendency of this dispute, at its November 2012 meeting, the Ethics Commission adopted the Ethics Commission Regulations for Violations of the Sunshine Ordinance. The regulations took effect January 25, 2013.

#### **E. THE SUPERIOR COURT'S ORDER**

On September 18, 2013, Grossman filed a verified petition for a writ of mandate ("Petition") in the Superior Court below seeking an order compelling Petitioners to produce the public records he had requested nearly a year earlier. (Petition Exhibits, p. 1.) Petitioners filed a written opposition, in which they admitted that four documents were improperly withheld. (*Id.*, p. 104, ¶ 6.) Petitioners' opposition also specified, for the

first time, that 24 documents had been withheld on the basis of attorney-client privilege and the attorney work product doctrine, consisting of 15 requests from the Ethics Commission's staff to the City Attorney's Office for legal advice concerning the proposed regulations, and nine documents allegedly including legal advice from the City Attorney's Office in response. (*Id.*, p. 104 ¶ 7.)

The matter came before the Superior Court for hearing on October 25, 2013. On October 29, 2013, the court issued the order requested by Grossman, requiring Petitioners to produce the requested documents. (Petition Exhibits, pp. 204-206.) Petitioners did not produce the records. On November 22, 2013, the City filed this Petition for Peremptory Writ of Mandate and/or Prohibition under California Government Code section 6259(c), along with a Motion to Stay under California Government Code section 6259(c).

### **III. ARGUMENT**

#### **A. PETITIONERS IMPROPERLY ASSERT THIS WRIT**

This writ is ostensibly filed on behalf of the Ethics Commission and its Executive Director. The Ethics Commission has not, however, authorized this proceeding, and public records indicate that it may not even be aware it was filed. (See RJN, Ex. 5.) For that reason alone, the Petition is void and should not be considered.

To bring this Petition, Petitioners were required to follow proper procedure laid out by the Brown Act. The decision to file this Petition is an "action taken" under the Brown Act because it is "a collective commitment...of a legislative body to make a positive...decision." (Gov. Code, § 54952.6.) Before taking such an "action" the Ethics Commission is required to comply with Section 54954.2(a) of the Act, which requires, among other things (1) posting an agenda at least 72 hours before the meeting containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in a closed session, and (2) that no action or discussion shall be undertaken on any item not appearing on the posted agenda. Should the action involve litigation and should the legislative body have a need to hold a closed session to discuss that litigation, it must first announce that closed session and identify the litigation to be discussed. (Gov. Code, § 54956.9.) The Ethics Commission's bylaws specifically require that it abide by this provision. (See Article I, Section 3 ["The Commission shall comply with all applicable laws, including, but not limited to, the San Francisco Charter, San Francisco Sunshine Ordinance...the Ralph M. Brown Act..."].) (See RJN, Ex. 3.)

None of the required steps were taken. While the writ is taken in the name of the Ethics Commission, the Ethics Commission did not actually bring it. Because the Ethics Commission has never authorized this Petition

or taken the action necessary to initiate and maintain it, the Court ought to deny it outright.

**B. CALIFORNIA LAW PROVIDES FOR BROAD PUBLIC ACCESS TO GOVERNMENT RECORDS**

The California Constitution enshrines a broad right of public access to government records:

The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(Cal. Const., art. I, § 3.) In the CPRA, the Legislature called public access to government records a “fundamental and necessary right”:

In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

(Gov. Code, § 6250.) Therefore, the CPRA provides that “every person has a right to inspect any public record.” (Gov. Code, § 6253.)

“Public records” are broadly defined to include “any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” (Gov. Code, § 6252, subd. (d).) Section 6253(b) of the CPRA requires disclosure of non-exempt public records upon request:

Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(Gov. Code, § 6253(b).)

**C. AS AUTHORIZED BY THE CPRA, THE VOTERS OF SAN FRANCISCO ELECTED TO BROADEN ACCESS TO PUBLIC RECORDS**

Though the CPRA provides for certain exemptions to disclosure, the California Constitution mandates that any such limitation be narrowly construed, in favor of public access:

A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(Cal. Const., art. I, § 3, subd. (b)(2); see also *Sander v. State Bar of California* (Dec. 19, 2013, S194951) \_\_ Cal.4th \_\_ [2013 WL 6670717, \*7] [affirming mandate that exemptions to public disclosure be construed narrowly].) Courts have called those narrow statutory exceptions to that complete right of access “islands of privacy upon the broad seas of

enforced disclosure.” (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 653 [117 Cal.Rptr. 106].)

Binding on municipalities and local agencies, the CPRA’s right of access operates as a floor, not a ceiling—the law expressly authorizes any local government to “adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set out in [the CPRA.]” (Gov. Code, § 6253, subd. (e).) The provision at issue here, Sunshine Ordinance section 67.24(b)(1)(iii), is one that provides “greater access.” As expressly authorized by the CPRA, the San Francisco voters opted to shrink one of the islands of privacy by precluding San Francisco agencies from invoking certain statutory exceptions for public records falling within certain narrowly defined subject areas, namely, the laws governing ethics and public access. Through the Sunshine Ordinance, the voters of San Francisco provided “enhanced rights of public access to information and records” with respect to “[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any

San Francisco governmental ethics code, or [the Sunshine] Ordinance.”

(San Francisco Admin. Code, § 67.24, subd. (b)(1)(iii)) (See RJN, Ex. 1.)<sup>2</sup>

**D. THERE IS NO CONFLICT BETWEEN THE CITY CHARTER  
AND THE SUNSHINE ORDINANCE**

Petitioners concede that the records requested by Grossman fall within the scope of Sunshine Ordinance section 67.24(b)(1)(iii). They argue, however, that the provision is invalid because it conflicts with the City Charter sections 6.100 and 6.102. (Petition at p. 28.) There is no such conflict.

City Charter section 6.100 merely designates the City Attorney as counsel and provides that he or she will have “such additional powers and duties prescribed by state laws for their respective office.” (See RJN, Ex. 2.) Section 6.102 sets out certain duties for the City Attorney, including

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<sup>2</sup> The Sunshine Ordinance also empowers the Sunshine Ordinance Task Force to determine when there has been a violation of the Ordinance. (San Francisco Admin. Code, § 67.21, subd. (e).) (See RJN, Ex. 2.) Pursuant to that authority, the Sunshine Ordinance Task Force June 24, 2013 Order of Determination finding a violation of Sunshine Ordinance sections 67.21(b) and 67.24(b)(1), and ordering St. Croix to produce the requested records should be given deference. To do otherwise would undermine the complaint, hearing and referral process of the Sunshine Ordinance, which was intended to give requesting parties an efficient process for resolution of public records complaints. Deference is particularly warranted here, where Petitioners did not raise the defenses on which they now rely until after Grossman filed a mandamus action in the Superior Court. Tolerance of such sandbagging would encourage dragged-out litigation and further encumber the judicial system.

“provid[ing] advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County.” (See RJN, Ex. 2.) Section 67.24(b)(1)(iii) requires that certain categories of public records—those relating to public records laws themselves—be publicly accessible. (See RJN, Ex. 1.) The two laws can be read in perfect harmony. The City Attorney may carry out his or her duties, but when communicating or providing advice about public records laws, must do so in a manner that is publicly accessible manner.

The City Charter is silent with respect to the confidentiality of communications with the City Attorney. None of its provisions mandate that such communications take place within the boundaries of attorney-client privilege. Petitioners would have the Court read into that silence a blanket requirement that all such communications are confidential, and in doing so *create* a conflict with the express provisions of the Sunshine Ordinance, which was adopted by the same electorate a few years later. The Court should not strain to find a conflict where none exists; to the contrary, it should strive for interpretations of statutes that *avoid* conflict and do not render laws invalid. (*People v. Kennedy* (2001) 91 Cal.App.4th 288, 297 [110 Cal.Rptr.2d 203] [“It is our duty when interpreting statutes to adopt, if possible, a construction which avoids apparent conflicts between

different statutory provisions, even if the provisions appear in different codes” (citations omitted)].<sup>3</sup>

Not only would such a construction bring the two municipal provisions into conflict, it would *narrow* Petitioners’ obligation to allow public access to records. The California Constitution, obviously superior to any local law, expressly requires that “[a] statute...shall be broadly construed if it furthers people’s right of access, and narrowly construed if it limits the right of access.” (Cal. Const., art. I, § 3, subd. (b)(2); see also *Sander, supra*, \_\_ Cal.4th \_\_ [2013 WL 6670717, \*7].)

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<sup>3</sup> Because there is no conflict, *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161 [36 Cal.Rptr.2d 521] is inapposite. In that case, the court examined whether a city charter precluded the city from implementing a program requiring bidders to engage in certain conduct as part of the competitive bid process where the charter contained no provision expressly allowing this program. In determining whether the implementation of the program conflicted with the charter, the court first “construe[d] the charter in the same manner as [it] would a statute...to ascertain and effectuate legislative intent....look[ing] first to the language of the charter, giv[ing] effect to its plain meaning...” (*Id.* at 171-172.) The court explained that since the charter did not expressly authorize or forbid the city from adopting the program, “the validity...must be ascertained with reference to the purpose” of the program.” (*Id.* at 173.) The court found that there was no conflict because the program was compatible with the charter’s provisions regarding bidding. Here, the purpose of the Sunshine Ordinance is not incompatible with the Charter’s designation of privilege. Nothing in the Charter indicates that *all* communications between the City Attorney and his or her clients are necessarily privileged. Reading the Charter to contain such an implication does not give effect to its plain meaning.

E.     **THERE IS NO CONFLICT BECAUSE ATTORNEY-CLIENT COMMUNICATIONS ARE NOT NECESSARILY CONFIDENTIAL**

Petitioners' argument rests on the mistaken premise that *all* communications with an attorney are *necessarily* confidential. They contend, "Because confidentiality is well-understood to apply to the attorney-client relationship and because it is fundamental to that relationship, the voters necessarily intended that the privilege apply to the City Attorney's advice." (Petition at p. 21.) However, it is plain that communications with attorneys, including advice and requests for advice, are very often non-confidential.

That is particularly true for public sector lawyers, who are subject to mandates that *require* them to provide certain types of advice in settings that must be accessible to the public. For example, this state's Brown Act mandates that meetings of local legislative and other bodies be conducted in the open, including any communications with counsel not related to pending litigation. (Gov. Code, § 54956.9.) Even when the purpose of a local legislative body's communications is "to confer with, or receive advice from ... legal counsel," the body's sessions must remain public, and may go into closed session only if "open session concerning those matters would prejudice the disposition of the local agency in the litigation." (*Id.*) In other words, the Brown Act mandates that *most* attorney-client communications with a local legislative body take place in *open* session.

When the advice being sought or provided by the attorney does not concern pending litigation, that attorney-client communication must be in public. (See, e.g., *Stockton Newspapers, Inc. v. Members of Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105 [214 Cal.Rptr. 561] [no exemption where “purpose of the communications with the attorney is a legislative commitment”].)<sup>4</sup>

By enacting the Brown Act, the California Legislature made clear that it believes that the relationship between a municipal body and its attorney does not *require* confidentiality, and that advice outside of the context of pending litigation must be carried out in full view of the public. Petitioners quote from various cases extolling the virtue of confidentiality in the attorney-client relationship, but those statements do not add up to a requirement that an attorney can perform his or her duties only in secret.<sup>5</sup>

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<sup>4</sup> The provision is sometimes referred to as a legislative abrogation of the attorney-client privileges. (*Shapiro v. Bd. of Directors of Ctr. City Dev. Corp.* (2005) 134 Cal.App.4th 170, 174 [35 Cal.Rptr.3d 826].)

<sup>5</sup> Academic studies agree that an attorney’s representation of a public entity client can be fulfilled in an environment where the attorney-client privilege has been limited or altogether eliminated. The author of the leading treatise on the attorney-client privilege wrote, “Under the logic of open meetings, sunshine, and freedom of information acts, seven states” have abolished the attorney-client privilege altogether. (Paul R. Rice, *The Government’s Attorney-Client Privilege: Should It Have One?*, Pub. Couns. Newsletter, (Md. St. B. Ass’n, Baltimore, MD), <http://www.acprivilege.com/articles/acgov.md.htm> [cited in Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys* (2007) 20 Geo. J. Legal Ethics 163, 183].) He notes,

In San Francisco—like other California cities—the City Attorney routinely provides advice to the Board of Supervisors, the Ethics Commission, and other city boards, in open session. Other states have gone further, with some eliminating the privilege entirely. (See, e.g., *Arkansas Highway and Transp. Dept. v. Hope Brick Works, Inc.* (1988) 294 Ark. 490, 495 [744 S.W.2d 711, 714] [explaining that attorney-client privilege is not an exemption to the state’s Freedom of Information Act].)

Further, the case law cited by Petitioners suggesting that an attorney-client exemption exists is inapposite. They argue that *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363 [20 Cal.Rptr.2d 330, 853 P.2d 496] stands for the proposition that written matter sent from an attorney to a government client is regulated by the Public Records Act and not the section of the Brown Act abrogating the privilege. The court in *Roberts* said “[w]e see nothing in the legislative history of the amendment suggesting the Legislature intended to abrogate the attorney-client privilege that applies under the Public Records Act, or that it intended to bring written communications from counsel to governing body within the scope of the Brown Act’s open meeting requirements.” (*Id.* at 377.) That logic does not extend to the specific provision in the Sunshine Ordinance that *is*

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“Significantly, there have so far been no reported adverse consequences from this action.” (*Id.*)

intended to bring written communications from counsel to governing body within the scope of open meeting requirements. In addition, the case is distinguishable on its facts. In *Roberts*, the court addressed whether the City of Palmdale needed to make public a letter from City Council regarding a parcel map application. The Supreme Court specifically addressed the issue of whether the letter would only be privileged where there is pending litigation. Here, no such argument is made. Grossman does not contend that a privilege cannot exist outside of pending litigation. Instead, the argument is that valid local laws provide that “[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act...any San Francisco governmental ethics code or this Ordinance [i.e. the Sunshine Ordinance]” must be produced. (San Francisco Admin. Code, § 67.24, subd. (b)(1)(iii).) (See RJN, Ex. 1.) In other words, the records at issue here are not privileged from the outset, regardless of whether there is pending litigation.

**F. A LAWYER’S OBLIGATION TO MAINTAIN CONFIDENCES  
DOES NOT CONVERT NON-CONFIDENTIAL  
COMMUNICATIONS TO CONFIDENTIAL ONES**

Petitioners’ flawed position is not rescued by their assertion that “Section 6.100 provides that the City Attorney is subject to the ‘duties prescribed by state laws.’” (See RJN, Exh. 2.) The State Bar Act requires an attorney “[t]o maintain inviolate the confidence, and at every peril to

himself or herself to preserve the secrets, of his or her client.’ (Cal. Bus. & Prof. Code, § 6068, subd. (e)(1).)” (Petition at p. 26.)

Petitioners also contend that Sunshine Ordinance section 67.24 (b)(1)(iii) makes it impossible for the City Attorney to carry out his obligations under Business and Professions Code section 6068(e)(1), which requires an attorney to protect a client’s “confidence” and to “preserve the secrets[] of his or her client,” and Rule of Professional Conduct 3-100 which similarly prohibits disclosure of client confidences. The logic is backward: what an attorney is required to do says nothing about whether his client is under an obligation to produce information. Those provisions governing an attorney’s duty of confidentiality have no bearing on the principal’s duties, and even with respect to the attorney, do not apply to communications that were not confidential in the first place. The City Attorney would not run afoul of his confidentiality obligations by disclosing advice provided to a local board in open session. Similarly here, he does not risk a violation governing only “secrets” and “confidence[s]” when the communications were, by operation of law, publicly accessible and therefore never confidential in the first place.<sup>6</sup>

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<sup>6</sup> The same is true with regard to Petitioners’ argument that the City Attorney is subject to duties of confidentiality imposed by the Rules of Professional Conduct. (See Petition at pp. 22-23.) The argument is not relevant here because neither state law nor the Rules mandate that all communications are privileged or, even more specifically, that the

The arguments made by Petitioners here have been rejected by other courts addressing similar claims. For example, in *Dist. Atty. for Plymouth Dist. v. Bd. of Selectmen of Middleborough* (1985) 395 Mass. 629, 633–34 [481 N.E.2d 1128, 1131] the Massachusetts Supreme Judicial Council (the Commonwealth’s highest court) ruled that a municipal board could not invoke the attorney-client privilege to create an exception to the state’s open meeting law: “We view § 23B as a statutory public waiver of any possible privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute.” (*Id.* at 1131.) The Court expressly held that the law did not require attorneys to violate their ethical duties because the “attorney-client privilege is the client’s privilege to waive,” meaning that if “a client chooses to waive the privilege of confidentiality, the attorney is under no further ethical obligation to keep the communications secret.” (*Ibid.*)

**G. OPEN GOVERNMENT LAWS ARE NOT INCOMPATIBLE  
WITH THE ATTORNEY-CLIENT RELATIONSHIP**

Petitioners’ contention that Section 67.24 (b)(1)(iii) prevents the City Attorney from carrying out his duties as attorney for the City and its agencies is a gross exaggeration. The section merely provides that communications on certain subject matters, namely those *pertaining to*

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communications at issue here are privileged. They do not create a privilege where one does not otherwise exist.

*open government laws*, remain accessible to the public. It is not a reorganization of the relationship between the City Attorney and his clients, nor is openness fundamentally incompatible with the attorney-client privilege.<sup>7</sup>

The City Attorney's own "Good Government Guide" recognizes that

[L]egal advice on ethics laws and open government laws may not be confidential for another reason. The Sunshine Ordinance provides that notwithstanding any exemption provided by law, any written legal advice about conflicts or open government laws may not be withheld from disclosure in response to a public records request. Accordingly, the practice of the City Attorney's Office is to inform any officer or employee who requests such advice in writing that the advice may be subject to disclosure upon request by a member of the public.

(See RJN, Ex. 4. at pp.22-23 (emphasis added).)

Petitioner relies on the rule that what is implied in a statute or a city charter is as "much a part of it as that which is expressed" (Petition at p. 21) to force an implied blanket of confidentiality over all attorney communications and to construct incompatibility between open government

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<sup>7</sup> San Francisco Administrative Code section 67.24 contains other provisions precluding San Francisco agencies from asserting CPRA exemptions that have not been challenged by the City. For example, Section 67.24(c) allows disclosure of a broad range of personnel information, and Section 67.24(h) precludes assertion of the deliberative process privilege, and Section 67.24(g) precludes reliance on the CPRA's "catch-all" provision. To Grossman's awareness, none of the above have been attacked. (See RJN, Ex. 1.)

laws and confidentiality. (See Petition at p. 21 (citing *Johnston v. Baker* (1914) 167 Cal. 260, 264 [139 P. 86] and *Currieri v. City of Roseville* (1970) 4 Cal.App.3d 997, 1001 [84 Cal.Rptr. 615]).) Neither case cited by Petitioner suggests that the Court here ought to find that voters intended for every communication with or all advice from the City Attorney to be confidential. That finding goes far beyond the implied findings in *Johnston* and *Currieri*. In *Johnston*, the court indicated that a statute authorizing the court in its discretion to dismiss an action two years after an answer was filed necessarily implied that a court could order dismissal at any time prior to the expiration of two years as well. In *Currieri*, the city charter provided that the probation period for a city employee would not exceed one year before the employee's appointment becomes permanent, "carry[ing] with [it] the necessary implication that the probationary employee, although he may be discharged summarily at any time during the probationary year, thereafter automatically attains a permanent status." (*Currieri, supra*, at p. 1001.) This is nothing like the broad implication of mandatory confidentiality that the Petitioner suggests here. Where the implication in *Johnston* and *Currieri* logically flows from the language and intent of the statutes, broadening privilege to apply to every attorney communication and every piece of attorney advice is not as natural a reading. To the contrary, it would be a gross expansion of the privilege doctrine and would undermine its structure by shifting the burden for proving confidentiality.

Petitioner also cites *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766 [190 Cal.Rptr. 919, 661 P.2d] for the contention that representation of clients in welfare proceedings necessarily includes confidentiality protections, even where a client's representative may not be an attorney. There, the court found that the attorney-client privilege was implied by the statute allowing for hearings under the aid to families with dependent children statute. In other words, the privilege was contextual and grounded in a specific need. That is unlike Petitioner's argument here that all communications between the City Attorney and his clients are necessarily privileged, regardless of the context or circumstances.

Petitioner then cites cases extolling the virtue of protecting confidentiality as a justification for upholding the alleged privilege in this case. (See Petition at pp. 22-23 (citing *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146 [86 Cal.Rptr.2d 816, 980 P.2d 371]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1207 [40 Cal.Rptr.2d 456, 892 P.2d 1199]; *Hunt v. Blackburn* (1888) 128 U.S. 464, 470 [9 S.Ct. 125, 32 L.Ed. 488]).) This is an exercise in shadowboxing; Grossman does not dispute that confidentiality is a key component of our legal system, that it is a public policy concern and that it allows frank and open communication between a client and his or her attorney. None of those virtues of confidentiality, however, require that every communication between a client and his or her attorney be

confidential. Nor do those virtues mandate a finding that the communications at issue here must be privileged.

Petitioners also cite *Roberts, supra*, 5 Cal.4th at p. 380, *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 913 [159 Cal.Rptr.3d 789] and *Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs* (1967) 255 Cal.App.2d 51, 54 [62 Cal.Rptr. 819] for the argument that local governments, like private citizens, need to confidentially confer with their lawyers, even despite open meeting laws. As discussed at, *supra* page 23, *Roberts* is distinguishable because it specifically addressed privilege in the context of pending litigation, which has no application here. *Citizens for Ceres*, which held that a statute calling for the collection of privileged documents “does not mean agencies must disregard all privileges when assembling CEQA administrative records” is ultimately unhelpful to Petitioners because the court went on to say that courts “are required to go cautiously when interpreting statutes that might either expand or limit privileges, for we are forbidden to create privileges or establish exceptions to privileges through case-by-case decision making.” (*Citizens for Ceres, supra*, at p. 912.) Here, Petitioner is expressly asking the Court to create a privilege where it otherwise does not necessarily exist. The court in *Citizens for Ceres* said that “if the Legislature had intended to abrogate all privileges for purposes of compiling CEQA administrative records, it would have said so clearly.” (*Id.* at p. 913.) What was muddy in that case

is crystal clear in this one: the San Francisco Sunshine Ordinance specifically exempts from privilege the communications that are at issue.

Finally, Petitioners' reliance on *Sacramento Newspaper Guild* is misplaced, namely because Petitioners do here exactly what the court there warned against there: "Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash." (*Sacramento Newspaper Guild*, *supra*, 255 Cal.App.2d at p. 58.)

#### **H. PETITIONERS CANNOT SHOW WHY DISCLOSURE OF THESE COMMUNICATIONS WOULD IMPEDE THE CITY ATTORNEY'S REPRESENTATION**

The premise that the City Attorney cannot carry out his duties if his client may be under an obligation to make those communications public is simply wrong, and wholly incompatible with the California Legislature's judgment in the Brown Act context that an attorney's advice to local bodies *should* be carried out in public. The subject matter of Grossman's request epitomizes the type of advice that does not depend on confidentiality. He sought drafts and final versions of the Ethics Commission's regulations governing the handling of Sunshine Ordinance matters, the associated staff

report, and records relating to the “preparation, review, revision and distribution” of the drafts and staff report. The drafting of procedural regulations is akin to a legislative function—different members of the public may have different views about what the procedures should look like, but the process is fundamentally non-adversarial. No unfair advantage would be conferred by giving the public an insight into the City Attorney’s views on different versions. Notably, at the most recent Ethics Commission meeting, the Deputy City Attorney provided legal advice in open session on further proposed changes to the Sunshine Ordinance regulations at issue.

Petitioners argue that “the abrogation of the privilege significantly impedes the City Attorney’s function.” (Petition at p. 30.) Petitioners recite a parade of horrors that might ensue if litigation adversaries could attack the attorney-client privilege through Sunshine Act or CPRA requests. Whatever justification might be found for limiting disclosure in the context of active litigation, those admittedly trickier circumstances are not found here. The drafting of regulations is a process that should be open, and the provision of candid, honest, well-reasoned and complete legal advice in connection with that process is not impeded by disclosure. There is no reason to believe the questions to the City Attorney or his answers would be any different regardless of whether communications were public or private. The Court need not reach the issue of whether a litigation

exception should be read into the law, and need only apply the law as written.

Petitioners cite *Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684 [52 Cal.Rptr.2d 161], a case where the court held that a city council could not impair the city attorney's charter duties through a budget ordinance and that only voters could change the city attorney's duties by amending the city's charter, to argue that the San Francisco City Charter controls in this case. Here, however, the Sunshine Ordinance did not constitute a change to the city attorney's duties. It merely requires that a certain category of documents be made available for public review, taking those documents out of the potential realm of privilege. That does not conflict with any duty set out in the City Charter, as the Charter does not require or mandate that all communications between an attorney and client be privileged and confidential in the first place.

#### **I. IF THERE WAS A PRIVILEGE, THE VOTERS COULD WAIVE IT**

Because San Francisco law requires that the public records at issue be made public, they were never confidential in the first place, and no privilege ever attached. The waiver of privilege is therefore a misleading and inapposite frame of reference here. But if disclosure here were viewed as a waiver of privilege, it is clear that the voters of San Francisco were empowered to make that waiver.

Whatever difficulty a municipal lawyer might have in ascertaining who holds the power to waive the City's privilege dissolves when the voters speak through the ballot box. The California Constitution states: "All political power is inherent in the people." (Cal. Const., art. II, § 1.) The San Francisco City Charter grants plenary legislative power through direct action by the voters, providing that "the voters of the City and County shall have the power to enact initiatives and the power to nullify acts or measure involving legislative matters by referendum." (City Charter, §14.100.) (See RJN, Ex.2.) The Sunshine Ordinance was a valid and proper exercise of that authority.

In addition, as discussed above, local enactments like Sunshine Ordinance section 67.24 (b)(1)(iii) are expressly authorized by the CPRA. (Gov. Code, § 6253, subd. (e).) It is beyond cavil that state law supersedes local law. (*Candid Enterprises, Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 885 [218 Cal.Rptr. 303, 705 P.2d 876] ["If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void."].) Whatever the hierarchical relationship between a general provision of the City Charter and a detailed, specific enactment by the voters directly, the fact that the pertinent section here was authorized by express state law renders the debate of no significance.

Again, privilege is the wrong frame for this analysis because the voters' directive here is not to the *attorney*, but to the city officials who

work for and on behalf of the voters. It may be that the City Attorney is bound not to disclose privileged information, and to act zealously on behalf of his clients, but that says nothing about whether those clients may choose to give up their right to confidentiality. The voters' plenary legislative authority includes the power to compel their own officials to waive privilege.<sup>8</sup>

Petitioners' arguments to the contrary do not survive scrutiny. They ask, "[I]f voters could withdraw the privilege by ordinance in regard to the matters mentioned above, why could they not do the same for any subject on which the City Attorney advises City officials?" (Petition at p. 31.) They contend that the Sunshine Ordinance might be construed to allow an adversary to access litigation strategy, or to undermine the obligation of the City to provide a defense to individual police officers. (*Id.*) But this Court need not address the boundaries of extreme situations raised only hypothetically here. Petitioners suggest that this is a slippery slope, but it is not. There may be circumstances where the right of public access conflicts

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<sup>8</sup> Any distinction between attorney work product and attorney-client privilege makes no difference here. As a preliminary factual matter, some of the documents at issue are *requests* for advice to the Deputy City Attorney, so they cannot be work product. Second, Petitioners overstate the law by suggesting that a client may not disclose communications with their attorney that happen to contain work product without the attorneys' consent. The law is clear that "an attorney's work product belongs absolutely to the client." (*Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950 [203 Cal.Rptr. 879].)

with other individual rights in other situations, but those issues are not raised here, and remain, if anything, a question for another day.

Finally, Petitioners place great weight on the alleged differences between the process for instituting an amendment to the City Charter and passing an ordinance. Though there are some procedural differences for placing the matter on the ballot, the fact remains that simple majority voter approval is required for both. The Sunshine Ordinance was passed by a majority of the San Francisco voters, whose express will would be undone by the action (taken on the ostensible authority) of their own elected officials here. The Court should strive to give effect to their will here, not strain to read words into statutory silence to find a conflict that it must then resolve.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court should not invalidate a key provision of the Sunshine Ordinance allowing for the disclosure of documents requested by Grossman. That is especially true in these circumstances, where Petitioners fail to show that disclosure would undermine the attorney-client relationship. Grossman respectfully requests that this Petition be denied and that Petitioners be compelled to make the requested public records immediately available.

DATED: December 23, 2013

KERR & WAGSTAFFE LLP

By: 

MICHAEL NG


*Attorneys for Allen Grossman*

**CERTIFICATION OF COMPLIANCE WITH WORD LIMIT**

Pursuant to Rule of Court 8.204(c)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 8,361 words.

DATED: December 23, 2013

**KERR & WAGSTAFFE LLP**

  
\_\_\_\_\_  
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**PROOF OF SERVICE**

I, Sarah Guzman, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 100 Spear Street, 18th Floor, San Francisco, California 94105.

On December 23, 2013, I served the following document(s):

OPPOSITION TO PETITION FOR PEREMPTORY WRIT OF  
MANDATE AND/OR PROHIBITION [CALIFORNIA  
GOVERNMENT CODE SECTION 6259(C)]

on the parties listed below as follows:


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- ☒ **By first class mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.
- ☒ **By electronic submission** by submitting a text searchable Portable Document Format ("PDF") via the Court of Appeal online form to the Supreme Court of California pursuant to CRC 8.212(c).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 23, 2013, at San Francisco, California.

  
\_\_\_\_\_  
Sarah Guzman

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

JOHN ST. CROIX, EXECUTIVE  
DIRECTOR, SAN FRANCISCO  
ETHICS COMMISSION; and SAN  
FRANCISCO ETHICS COMMISSION,

Petitioners/Respondents,

vs.

SUPERIOR COURT OF CALIFORNIA  
FOR THE CITY AND COUNTY OF  
SAN FRANCISCO,

Respondent/Appellant.

ALLEN GROSSMAN,

Real Party in Interest.

Case No. A140308

San Francisco County Superior  
Court No. CPF-13-513221

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REPLY TO OPPOSITION TO PETITION  
FOR PEREMPTORY WRIT OF  
MANDATE AND/OR PROHIBITION  
[CALIFORNIA GOVERNMENT CODE  
SECTION 6259(c)]

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The Honorable Ernest H. Goldsmith

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## INTRODUCTION

Although Grossman's arguments are difficult to unwrap, he appears to advocate for either of the following two approaches:

First, he appears to ask the Court to assume that the voters who approved the Charter provisions involving the City Attorney did not care whether the City Attorney's communications with clients would be confidential, and therefore never intended to incorporate the state-law privileges that protect communications between lawyer and client, even though these privileges apply to every other attorney-client relationship in California. But it is impossible to ascribe to the voters a belief that these protections were unimportant to the relationship between San Francisco's policymakers and their lawyers. Consider just a few of the many policy measures enacted in San Francisco in recent years: the groundbreaking Healthy San Francisco program, major new gun control initiatives, legislation limiting tobacco sales, and a ban on the use of plastic bags in grocery stores. The City Attorney provides legal advice when San Francisco policymakers consider such proposals, and disclosure of that advice would obviously be of great advantage to prospective litigation opponents – opponents who were lying in wait to sue the City in each of these instances. It is inconceivable that the voters, when adopting the Charter, intended to allow the important strategic communications between their representatives and the City Attorney to remain unprotected. But that is the assumption the Court would have to adopt if it accepted Grossman's argument that a mere ordinance can bar assertion of the attorney-client privilege or attorney work product protection.

Second, perhaps recognizing how legally and logically troublesome the above conclusion would be, Grossman at times appears to assume that

the Charter was meant to incorporate the state-law confidentiality protections for some types of communications but not others, requiring a case-by-case determination of whether the Charter protects a particular type of communication from disclosure. This assumption underlies Grossman's suggestion that the Court could hold that communications between the City Attorney and his clients about litigation-related matters remain protected from disclosure, while communications about policy matters do not. But the Charter's text contains no hint of such a distinction, which would in any event fly in the face of state law, which protects written communications by attorneys regardless of whether litigation is implicated (and regardless of whether the attorney is in the public or private sector). Furthermore, as a practical matter it would be impossible for a court to guess where the voters intended to draw the line between what should and should not be protected. Indeed, this case provides a perfect illustration of the hazard. Grossman casually assumes a bright line between "litigation" and "legislation," and further assumes this case falls on the legislative side. But this case involves the adoption of regulations that Grossman, a local Sunshine activist who had previously sued the City over Sunshine matters, contended in writing on several occasions were illegal. That is the definition of litigation risk. Therefore, if anything, this dispute underscores why the voters necessarily intended that the entire relationship between the City Attorney's Office and its clients (not just some unspecified part of it) be subject to state-law confidentiality protections.

In contrast to the two approaches apparently advocated by Grossman, the City's proposed construction of the Charter makes sense from both a legal and logical standpoint. Of course the voters intended, when they established the City Attorney in the Charter, that his

communications with his clients would be subject to the same state-law confidentiality protections that inhere in every other attorney-client relationship in California. Of course they intended, when they specified that the City Attorney is subject to state law, that this would be the law governing the attorney-client relationship. To be sure, this means that some communications not protected by state law will be public (such as oral advice an attorney provides at a formal legislative meeting). But written communications between lawyer and client are always protected under state law, and that protection applies here. The voters are certainly entitled to change their minds about the nature of the relationship between the City Attorney and his clients, either generally or with regard to some particular type of communication. But if so, they must amend the Charter, because the Charter establishes that relationship. A mere ordinance purporting to accomplish this goal is invalid.

### BACKGROUND

A handful of Grossman's factual assertions require brief clarification.

First, Grossman asserts that the Ethics Commission previously shared drafts of its regulations with the Sunshine Ordinance Task Force ("Task Force"), but then stopped doing so for "unknown reasons." (Opposition ["Opp.,"] at 8.) He seeks to leave an impression that the Ethics Commission sought to slip something past the Task Force for nefarious reasons, but nothing could be further from the truth. When the Ethics Commission previously shared its draft regulations with the Task Force, the Task Force took nearly a year to provide a response. (Exhibits in Support of Petition ["Exh.,"] F at 107.) The next time around, Executive Director St. Croix, having already received input from the Task Force, determined it

would neither be useful nor efficient to submit another draft to the Task Force to await another round of comments. (*Id.*) Moreover, when the Ethics Commission was ready to proceed with its draft regulations in the Fall of 2012, the Task Force was not regularly meeting. (*Id.*) After meeting in July 2012, the Task Force did not meet again until November 2012. (*Id.*) The process by which the Ethics Commission adopted its Sunshine Ordinance regulations was wholly above board, and Grossman's suggestion to the contrary is meritless.

Second, with respect to Executive Director St. Croix's decision to respond to Grossman's document request by withholding privileged material, Grossman asserts that the Task Force "ordered" St. Croix to produce those documents, and that St. Croix "did not comply" with that order. (Opp. at 12.) However, the Task Force is a purely advisory body, as Grossman elsewhere concedes. (*See* Request for Judicial Notice in Support of Opposition, Exh. 1 at 5 [S.F. Admin. Code § 67.30(c)]; Opp. at 5.) It has no authority to "order" the Executive Director of the Ethics Commission to take any action, let alone disclose privileged attorney-client communications to a member of the public.<sup>1</sup>

Third, Grossman repeatedly asserts, without any support or explanation, that the Commission's consideration of the regulations at issue in this case had no litigation implications. For example, Grossman argues that "[n]o unfair advantage would be conferred by giving the public an insight into the City Attorney's views on different versions." (Opp. at 32.) This is simply untrue. As is often the case when a policymaking body

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<sup>1</sup> For this reason, Grossman's fleeting suggestion in a footnote that the Task Force's "order" is entitled to deference lacks merit. (*See* Opp. at 18 n.2.) Non-binding advisory opinions are not entitled to deference. (*See Zapara v. County of Orange* (1994) 26 Cal.App.4th 464, 470 n.4.)

considers legislation or regulations, here there was real litigation risk. After all, Grossman previously sued the Ethics Commission on a public records matter, and more recently had submitted several memoranda to the Ethics Commission asserting that its proposed regulations were unlawful under the Sunshine Ordinance. (Supplemental Request for Judicial Notice ["Supp. RJN"], Exhs. A-D.)<sup>2</sup> Under these circumstances, any sensible lawyer would recognize litigation risk, and communicate with his clients accordingly.

## ARGUMENT

### I. THE PETITION IS NOT PROCEDURALLY DEFECTIVE.

Grossman claims this petition is improper because the Ethics Commission did not meet publicly to authorize it. (Opp. at 13-15.) But the Ethics Commission is not required to approve the filing of an appeal or writ petition challenging a Superior Court order, especially where it played no role in responding to Grossman's public records request in the first place. Executive Director St. Croix (with the assistance of his staff) is responsible for the Ethics Commission's responses to public records requests. For this reason, Grossman directed his records request to St. Croix, and his subsequent Task Force complaint only named St. Croix as a respondent. (Exh. A at 19-20, 35-38.) And generally, as the Executive Director, St. Croix is in charge of the administration of the Ethics Commission. (See Request for Judicial Notice in Support of Petition ["RJN"], Exh. F at 2 [Charter § 15.101]; Supp. RJN, Exh. E [S.F. Admin. Code § 2A.30].) Such

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<sup>2</sup> Indeed, Grossman ghostwrote a memoranda that the Task Force submitted to the Ethics Commission under its name. (Supp. RJN Exh. D.) The fact that the Task Force is allowing private citizens to ghostwrite memoranda for it underscores the emptiness of Grossman's suggestion that the Task Force is entitled to deference.

administrative responsibility includes making litigation decisions with the City Attorney regarding cases involving the Ethics Commission.

In support of his argument, Grossman cites the Brown Act and its definition of “action taken.” (*See Opp.* at 14.) But the Brown Act sets forth procedures to be followed *if* a legislative body takes action; it does not interfere with decisions about *whether* a legislative body must take action as opposed to allowing decisions to be made at the staff level. (*See, e.g., Cal. Gov. Code* § 54952.2(b)(1) [majority of commission members may not meet outside of public’s view]; *id.* § 54954.2(a)(1) [commission must post meeting agendas at least 72 hours prior to meeting].) In other words, nothing in the Brown Act (or the definition of “action”) governs the division of responsibilities between the commissioners themselves and the Executive Director. It only provides that when the commissioners collectively take action, certain procedures must be followed. The commissioners were not required to take collective action here, so Grossman’s procedural argument is inapt.

## **II. THE SUNSHINE ORDINANCE PROVISION CONFLICTS WITH THE CHARTER.**

### **A. The City Does Not Argue For An “Expansion” Of The Privilege.**

Grossman seeks to create the impression that the City is asking the Court to undertake an “expansion” of the privilege doctrine. (*See Opp.* at 28.) This is not correct. The City is not asking the Court to hold that documents not otherwise considered privileged should now all of a sudden be deemed privileged. These are documents that by any definition fall within the state-law definition of attorney-client privilege (and for some, also the attorney work product protection). Contrary to Grossman’s assertions, privilege presumptively covers “every piece of attorney advice,”

provided to a client. (*See* Cal. Evid. Code § 952.) It is Grossman who is attempting to create the impression that certain documents protected by the privilege actually are not.

In connection with this effort, Grossman again relies heavily on the Brown Act. But the Brown Act is about public meetings, while this case is about documents. (*Compare* Cal. Gov. Code §§ 54950, 54953 [Brown Act requires open meetings] *with* Cal. Gov. Code §§ 6252-53 [Public Records Act concerns writings].) Indeed, under the Brown Act, even documents circulated in *conjunction* with a public meeting remain privileged if they reflect attorney-client communications. (*See Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 [“Despite the broad policy of the act to ensure that local governing bodies deliberate in public, the [Brown Act] itself incorporates the attorney-client privilege as to written materials distributed for discussion at a public meeting.”] [citations omitted]; Cal. Gov. Code §§ 54956.9(f), 54957.5(a) [incorporating Public Record Act exemptions].) The City’s decision to withhold the requested documents is consistent with this existing understanding of the privilege; it is Grossman who seeks to shrink the concept.

Furthermore, documents of this kind are subject to state-law confidentiality protections regardless of whether the communications are made by a private lawyer or a public lawyer, and regardless of whether the documents implicate litigation. The *Roberts* decision establishes this unequivocally. Grossman argues that “*Roberts* is distinguishable because it specifically addressed privilege in the context of pending litigation, which has no application here.” (Opp. at 30.) But this characterization of *Roberts* is outright false. In reality, the *Roberts* court rejected Grossman’s very

assertion, making clear the privilege applies regardless of whether litigation is involved:

... appellant's argument that public policy is best served by limiting the attorney-client privilege to situations in which there is litigation pending is inconsistent with the decision of the Legislature in enacting the Public Records Act to afford public entities the attorney-client privilege as to writings to the extent authorized by the Evidence Code.

(*Id.* at 380.) In short, the Brown Act does not limit confidentiality for written communications of public lawyers; it exists in concert with the Public Records Act and incorporates the same confidentiality protections for writings by public lawyers as exist under state law for writings by private lawyers:

The balance between the competing interests in open government and effective administration of justice has been struck for local governing bodies in the Public Records Act and the Brown Act. . . . although the Brown Act limits the attorney-client privilege in the context of local governing body meetings, it does not purport to abrogate the privilege as to written legal advice transmitted from counsel to members of the local governing body.

(*Id.* at 381.)

Grossman misrepresents *Stockton Newspapers, Inc. v.*

*Redevelopment Agency* (1985) 171 Cal.App.3d 95 in a similar manner. He cites it for the proposition that all attorney-client communications regarding legislation are not confidential. (*See Opp.* at 22.) But again, *Stockton Newspapers* only addressed the Brown Act and oral communications between an attorney and public officials, not written documents. As discussed, state-law confidentiality protections apply to written legal advice in policy-making and other non-litigation contexts.<sup>3</sup>

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<sup>3</sup> Grossman alludes to "academic studies" finding that government attorneys can ably advise their clients without attorney-client privilege. (*See Opp.* at 22 n.5.) But in support, he merely cites a state bar association newsletter that claims seven states have eliminated government attorney-client privilege without identifying any of those seven states or providing

**B. The Charter Cannot Be “Harmonized” With The Sunshine Ordinance Provision.**

Grossman’s primary argument appears to be that the Court should construe the “general” language of the Charter narrowly to avoid a conflict with the more “specific” Sunshine Ordinance, citing *People v. Kennedy* (2001) 91 Cal.App.4th 288, 297. (See Opp. at 19-20.) But in *Kennedy*, the court examined two provisions of equal dignity (that is, two state statutory provisions) and harmonized them to avoid a conflict, as courts often do. This case, in contrast, presents the question of whether an ordinance conflicts with a charter. Thus, far more applicable are cases in which courts consider whether an inferior provision conflicts with a superior one.

For example, *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048 involved a Sunshine Ordinance provision that required disclosure of law enforcement records for investigations that had been closed. The court examined whether this provision violated state law, which provided that local legislatures may not “obstruct” a district attorney’s investigatory or prosecutorial functions. (*Id.* at 1056-59 [citing Cal. Gov. Code § 25303].) The court *did not* inquire whether it should narrowly construe the superior state law provision to avoid a conflict. Instead, the *Rivero* court held that this provision of the Sunshine Ordinance (even though its language was specific and narrow) conflicted with the state statute (even though its language was general), because the state statute necessarily included protection of the closed files. (*Id.* at 1058-59.) The same approach is called for here. The Charter necessarily incorporates state-law

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any citations to state laws. (See Supp. RJN, Exh. F.) Regardless, in California, it is clear that the attorney-client privilege and attorney work product apply equally to the public sector and the private sector. (See, e.g., *Roberts*, 5 Cal.4th at 380-81; 70 Ops. Cal. Atty. Gen. 28, 1987 WL 247230 at \*8-9 (Jan. 30, 1987).)

confidentiality protections into the relationship between the City Attorney's Office and its clients. The Court should not strain to interpret the Charter in a manner contrary to this purpose simply to salvage an inferior provision that would otherwise conflict. This is especially true here, where courts should adhere to "a liberal construction in favor of the exercise of the privilege." (*Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 344.)

The folly of Grossman's insistence that the Court should construe the Charter narrowly to avoid a conflict with a mere ordinance is undermined by any number of real-life, modern-day examples. The Equal Protection and Due Process Clauses of the U.S. Constitution merely contain "general" language, but surely Grossman would not argue that they should be construed "narrowly" to avoid conflict with the more "specific" Defense of Marriage Act, which refused federal recognition of state-sanctioned marriages by same-sex couples. (*See United States v. Windsor*, 570 U.S. \_\_\_, 133 S.Ct. 2675 (Jun. 26, 2013).) The Fourth Amendment uses only general language, protecting against unreasonable searches or seizures, but presumably Grossman would not argue that this provision must be construed "narrowly" to avoid a conflict with a more "specific" federal statute authorizing the National Security Agency to eavesdrop on American citizens without a warrant. The fact that the Board of Supervisors' power under the San Francisco Charter to dispose of land for "public purposes" is not explicitly set forth (but only included as part of its general residual powers) does not mean the voters by mere ordinance may enact "specific" restrictions regarding the sale of land for such purposes. (*See City and County of San Francisco v. Patterson* (1988) 292 Cal.App.3d 95, 103). The point is that these more specific inferior enactments undermine the fundamental *purposes* of the superior general provisions, and therefore they

are invalid regardless of whether the general provisions could be construed, in the abstract, as not speaking to the question at hand.

Grossman also cites the City Attorney's Office's discussion of the Sunshine Ordinance provision in its Good Government Guide, as if to suggest that the Office has somehow conceded its consistency with the Charter. (*See* Opp. at 27.) That is wrong. The Guide merely warns clients of the existence of this provision, stating that certain legal advice may be subject to disclosure because of it. Any good lawyer would warn his clients of this possibility given the presence of the provision, but that is very different from conceding that the provision is valid.<sup>4</sup>

Finally, on a related note, Grossman persists in his argument that the Charter's protections can be abrogated by ordinance because state law, namely the Public Records Act, allows local governments to adopt laws that favor disclosure more than state law. (Opp. at 34.) This makes no sense. To be sure, the Public Records Act authorizes broader local disclosure laws, but those local laws must nonetheless be enacted lawfully. Nowhere does the Public Records Act seek to turn black-letter law upside down by allowing a local ordinance to trump a city charter. If San Francisco voters wish to exercise their authority under the Public Records Act to provide for more generous disclosure than contemplated by state law

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<sup>4</sup> Grossman further cites California Constitution article 1, section 3(b)(2) as supporting his position that the Charter cannot be interpreted to incorporate state-law protections of attorney-client privilege and attorney work product. (*See* Opp. at 15, 16, 20.) Assuming this provision even applied to local measures, nothing in the provision, or any case law examining its language, suggests that this section narrows the attorney-client privilege or attorney work product protection. In fact, this constitutional provision made no change to pre-existing law regarding public records. (*See BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750.)

or the City's Charter, they certainly may do so, but they must do so by amending the Charter.

**C. The *Welfare Rights* Decision Compels A Conclusion That The Charter Protects The Privilege.**

In its opening brief, the City relied heavily on the California Supreme Court's decision in *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766 for the proposition that the privilege is necessarily implied in the charter provisions establishing the City Attorney's relationship with his clients. In response, Grossman simply sticks his head in the sand, making a fleeting reference to *Welfare Rights* on page 29 of his brief. But *Welfare Rights* demonstrates with clarity why the City Attorney's duties set forth by Charter section 6.102 necessarily include the privilege.

In *Welfare Rights*, the Court held that laypeople's communications with their welfare-applicant clients were necessarily intended to be privileged, even though the statute authorizing laypeople to represent applicants did not expressly mention confidentiality or privilege. Here, the substantially less controversial issue is whether a charter provision establishing the City Attorney's relationship with his clients necessarily intended to incorporate the state-law privilege and work product protections that inhere in every other attorney-client relationship in California. To interpret the City Attorney's duties as set forth by the Charter as not incorporating the privilege would require the Court to assume that the voters "intended that the only sound advice the [City Attorney] could give was, 'Don't talk to me.'" (*Welfare Rights Org.*, 33 Cal.3d at 771 n.3.)

Grossman tries to brush this aside by asserting that in *Welfare Rights* "the privilege was contextual and grounded in a specific need." (Opp. at 29.) It is not entirely clear what Grossman means by this, because the

privilege exists regardless of context and does not turn on the subject matter of the advice. (*See Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557 [“the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case”].) To the extent Grossman suggests that only *some* types of otherwise-privileged communications by the City Attorney should be deemed protected by the Charter, certainly *Welfare Rights* provides no support for that. The Court did not hold that some confidential communications between the layperson and the client are privileged. It held that any communications that fall within the representation are privileged, pure and simple.

Grossman’s apparent fallback attempt to argue that the Charter confers confidentiality on only some types of communications by the City Attorney not only lacks support in the Charter itself or in *Welfare Rights*; it makes no common sense. Grossman appears to propose a distinction between matters that could involve litigation and matters of mere policymaking, ascribing to those who enacted the Charter an intent to protect the privilege for the former but not the latter. (*See Opp.* at 32.) But the line between these two is indistinct to say the least. In this very case, Grossman – someone who has relentlessly criticized and previously sued the Ethics Commission – submitted at least three memoranda to the Commission challenging the validity of its proposed regulations. (Supp. RJN, Exhs. B-D.) Indeed, he ghostwrote one of these memoranda for the Task Force. (*Id.*, Exh. D.) The memoranda argued that the proposed regulations conflicted with the Sunshine Ordinance, the Charter, and state law. (*See id.*) In a context like this, the clients have every reason to believe

that their communications with their lawyers could be used against them in litigation.

But ultimately Grossman's parsing misses the point, because the attorney-client privilege "applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened." (*Roberts*, 5 Cal.4th at 371.) Attorney work product protection is also "not limited to materials prepared in anticipation of litigation."<sup>5</sup> (70 Ops. Cal. Atty. Gen., 1987 WL 247230 at \*5.) Therefore, Grossman's apparent argument that the Charter could be interpreted to protect litigation-related communications but not policy-related communications has no basis in law, in addition to reflecting an ignorance of the fact that governmental policymaking, particularly on cutting-edge issues, often results in litigation.

In sum, *Welfare Rights* provides no basis for distinguishing between different types of attorney-client communications or considering their "context." Rather, *Welfare Rights* compels the conclusion that the Charter incorporates state-law confidentiality protections, rendering the contrary provision of the Sunshine Ordinance invalid.

**D. The Charter's Explicit Requirement That The City Attorney Comply With State Law Also Establishes The Confidentiality Of Attorney-Client Communications.**

As discussed in the Opening Brief, the Charter, in addition to generally establishing the relationship between the City Attorney's Office and its clients, specifies that the City Attorney's conduct is governed by

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<sup>5</sup> Incidentally, Grossman misleadingly states that attorney work product belongs to the client, not to the attorney. (*See* Opp. at 35 n.8 [citing *Kallen v. Delug* (1984) 157 Cal.App.3d 940].) *Kallen* addresses an attorney's duty to return client files at the end of an engagement, *see id.* at 950, not the "attorney work product" addressed by the Code of Civil Procedure. The attorney – not the client – is the "exclusive holder" of the attorney work product protection. (*See, e.g., Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 279.)

state law. (*See* RJN, Exh. B [Charter § 6.100].) This protects client confidentiality as well, because under state law, the State Bar Act and the Rules of Professional Conduct govern the attorney-client relationship.

In response, Grossman argues that the applicability of these state laws and rules do not matter, because they “do not apply to communications that were not confidential in the first place.” (Opp. at 25.) It is unclear what Grossman means by this. If he means that the communications at issue in this case are not the kinds of communications normally protected by state law, he is clearly wrong, as discussed in Subsection A.

Perhaps Grossman instead means to argue that the communications at issue here were “not confidential in the first place” because of the existence of the Sunshine provision. But that obviously begs the question presented by this case, because the voters cannot take away something by ordinance that they gave in the Charter. (*See Patterson*, 202 Cal.App.3d at 103 [because the Charter vested all residual powers in the Board of Supervisors, including by necessary implication the power to sell city land for a public purpose, the voters were precluded from adopting a mere ordinance limiting the circumstances in which city land could be sold].)

For the same reason, Grossman’s half-hearted argument that the voters “waived” the privilege when they enacted the Sunshine Ordinance provision misses the mark. The City agrees with Grossman that the Sunshine Ordinance is best understood not as a “waiver” but as an attempt to bar assertion of the privilege in the future by the City Attorney’s clients. But whether the Sunshine provision is considered a “waiver” or a “bar,” the point is that voters, through Charter section 6.100 as well as the other provisions discussed herein and in the opening brief, established that the

relationship between the City Attorney's Office and its clients is protected by state-law privilege and work product doctrines. If the voters wish to change or "waive" that, they must do so by amending the Charter.

### CONCLUSION

The Court should grant the petition for writ of mandate.

Dated: January 14, 2014

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,485 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 14, 2014.

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## PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102.

On January 14, 2014, I served the following document(s):

### **REPLY TO OPPOSITION TO PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(c)]**

on the following persons at the locations specified:

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[via hand delivery]

California Supreme Court  
[Submitted Electronically Through the  
Court Of Appeal E-Submission]

in the manner indicated below:

- ☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.
- ☒ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. A declaration from the messenger who made the delivery ☐ is attached or ☐ will be filed separately with the court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed January 14, 2014, at San Francisco, California.

s/Pamela Cheeseborough  
Pamela Cheeseborough

Case No. A140308

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

---

JOHN ST. CROIX, EXECUTIVE DIRECTOR, SAN FRANCISCO  
ETHICS COMMISSION; and SAN FRANCISCO ETHICS COMMISSION,

*Petitioners and Respondents,*

v.

SUPERIOR COURT OF CALIFORNIA FOR THE CITY  
AND COUNTY OF SAN FRANCISCO,

*Respondent and Appellant,*

---

ALLEN GROSSMAN,

*Real Party in Interest.*

---

Appeal from the Superior Court of San Francisco,  
Case No. CPF13513221  
The Honorable Ernest H. Goldsmith

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**SUPPLEMENTAL OPPOSITION TO PETITION FOR  
PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION  
[CALIFORNIA GOVERNMENT CODE SECTION 6259(C)]**

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## I. INTRODUCTION

Pursuant to the Court’s Order to Show Cause dated January 23, 2014, Real Party in Interest Allen Grossman (“Grossman”) respectfully submits this brief in response to the petition by San Francisco Ethics Commission (the “Ethics Commission”) and its Executive Director, John St. Croix (“St. Croix,” collectively with the Ethics Commission, “Petitioners”).<sup>1</sup>

The dispute here arises out of a proper public records request by Grossman to St. Croix, as custodian of public records for the Ethics Commission, pursuant to the California Public Records Act (Government Code sections 6250 *et seq.*, hereinafter, the “CPRA”) and the San Francisco Sunshine Ordinance (San Francisco Administrative Code sections 67.1 *et seq.*, hereinafter, the “Sunshine Ordinance”). The requested records relate to the Ethics Commission’s drafting of proposed regulations governing the handling of Sunshine Ordinance Task Force referrals and direct complaints filed with the Ethics Commission under the Sunshine Ordinance.

The CPRA permits a locality to “adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set out in [the CPRA.]” (Gov. Code, § 6253,

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<sup>1</sup> For the convenience of the Court, this brief incorporates background and argument from Grossman’s previously filed opposition, which this brief is intended to supersede.

subd. (e).) The Sunshine Ordinance, adopted by an overwhelming majority of San Francisco voters in 1999, does exactly that, by providing greater access to San Francisco's public records and meetings. Of pertinence here, the Sunshine Ordinance provides that "[n]otwithstanding a department's legal discretion to withhold certain information under the California Public Records Act," upon request a San Francisco agency must produce "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act ... any San Francisco governmental ethics code, or this Ordinance [*i.e.*, the Sunshine Ordinance]." (San Francisco Admin. Code, § 67.24, subd. (b)(1).) (See Request for Judicial Notice in Support of Supplemental Opposition to Petition for Peremptory Writ of Mandate ("Supp. RJN"), Ex. 1.) It is undisputed that the records requested by Grossman fall within the scope of section 67.24(b)(1)(iii).

In violation of those provisions, Petitioners refused to produce all of the requested documents. In particular, they refused to produce responsive communications with the San Francisco City Attorney's Office, citing the CPRA's provision exempting attorney-client privilege and attorney work product from the provisions of that statute. They were not entitled to withhold on those bases. The Sunshine Act is absolutely clear: a San Francisco agency *must* produce records falling within the categories specified in section 67.24(b)(1) *even if* the agency otherwise would have

“legal discretion” to withhold them. Thus, even if a city agency might otherwise have the right to withhold attorney-client communications or attorney work product, the Sunshine Ordinance prohibits non-disclosure on those bases when the records sought are advice concerning the Ethics Code or the Sunshine Ordinance itself.

Petitioners do not dispute that on its face, section 67.24(b)(1)(iii) compels the production of the public records in dispute. Instead—though they are a city agency and official—they challenge the validity of section 67.24(b)(1)(iii). They contend that because the Charter of San Francisco City and County (“City Charter”) appoints the City Attorney as counsel for San Francisco agencies and officials, any municipal law limiting the confidentiality of otherwise-privileged communications between the City Attorney and city agencies and officials is necessarily invalid. The City Charter says nothing of the sort, and is completely silent as to the attorney-client privilege. It certainly places no limitations on the city voters’ power to broaden public access to public records, a power expressly vested in municipalities by the CPRA.

Petitioners’ position rests on the erroneous notion that the City Charter’s appointment of the City Attorney, and its mandate that the City Attorney carry out his or her duties in conformance with the professional obligations applicable to all California attorneys, are fundamentally irreconcilable with the Sunshine Ordinance’s requirement that advice on

certain narrowly defined topics remain publicly accessible. That novel invalidation theory fails both legally and as a matter of basic logic. Not all communications between an attorney and his or her client are confidential; those that were never confidential in the first place are not protected by privilege. An attorney may have an obligation to protect confidential communications with a client, but that does not transmute non-confidential communications into privileged ones. Government attorneys in this state are regularly called on to provide advice to their clients in public; doing so does not violate those attorneys' duty of confidentiality. Petitioners' foundational premise that the City Attorney cannot fulfill his duties while conforming with section 67.24(b)(1)(iii) is simply wrong.

Especially in light of California's constitutional mandate (itself established by the state's voters by Proposition 59) that laws be construed in favor of the public's right of access, the Court should not take the extreme step of invalidating this important provision of the Sunshine Ordinance. Grossman respectfully requests that this Petition be denied and that Petitioners be compelled to make the requested public records immediately available.

## **II. FACTUAL BACKGROUND**

### **A. THE PARTIES**

Grossman is a longtime San Francisco resident and an advocate for open government. For many years, he has worked with other open

government advocates to push for full implementation of the Sunshine Ordinance and greater access to public records in San Francisco. The Ethics Commission is organized under Article XV of the City Charter and is a local agency within the meaning of Government Code section 6252(b) of the CPRA. The Ethics Commission consists of five members, who appoint an Executive Director, who serves as the Commission's chief executive. (City Charter, §§ 15.100, 15.101.) (See Supp. RJN, Ex. 2.) Petitioner John St. Croix ("St. Croix") is, and at all relevant times has been, the Ethics Commission's Executive Director.

**B. THE SUNSHINE ORDINANCE AND ETHICS COMMISSION REGULATIONS**

Pursuant to CPRA Government Code section 6253(e), the voters of San Francisco initiated and adopted the Sunshine Ordinance in November 1999; it took effect in January 2000. Among other things, the Sunshine Ordinance enhances San Franciscans' rights of access to public records and public meetings. It also established the Sunshine Ordinance Task Force to implement and carry out certain aspects of the law and the CPRA.

In addition to its substantive provisions, the Sunshine Ordinance sets out the process for enforcement of that law within San Francisco government. The Ethics Commission plays a critical role in that enforcement regime. For example, the Sunshine Ordinance specifically authorizes persons to enforce that law by instituting proceedings "before

the Ethics Commission if enforcement action is not taken by a city or state official 40 days after a complaint is filed.” (San Francisco Admin. Code, § 67.35, subd. (d)) (See Supp. RJN, Ex. 1.) It also instructs that “[c]omplaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission.” (*Id.* at § 67.34.)

Further, because the Sunshine Ordinance Task Force has no independent enforcement power, the Sunshine Ordinance provides that the Sunshine Ordinance Task Force “shall make referrals to a municipal office with enforcement power under this ordinance ... whenever it concludes that any person has violated any provisions of this ordinance or the Acts.” (San Francisco Admin. Code, § 67.30, subd. (c).) (See Supp. RJN, Ex. 1.) The Ethics Commission is the only such office, and is specifically given the power to enforce willful violations of the Sunshine Ordinance. (*Id.* § 67.35, subd. (d).) (See *Id.*) In addition, the 1996 voter-adopted City Charter authorizes the Ethics Commission to adopt “rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records.” (City Charter, § 15.102.) (See Supp. RJN, Ex. 2.)

Despite that important voter-mandated role, the Ethics Commission has failed to enforce the Sunshine Ordinance. Since 2004, when the

Sunshine Ordinance Task Force first referred a failure by a City respondent to comply with its order to disclose public records, it has referred almost 40 such cases to the Ethics Commission for enforcement. In each instance, the Ethics Commission declined to enforce the Order and dismissed the case. Grossman and other Sunshine Ordinance advocates have long criticized that lack of action by the Ethics Commission, as has a San Francisco civil grand jury in its 2010-2011 report, “San Francisco’s Ethics Commission: The Sleeping Watch Dog.”<sup>2</sup>

A major point of contention was the Ethics Commission’s reliance on inapposite regulations in its investigation and enforcement of Sunshine Ordinance referrals. From 2000, when the Sunshine Ordinance became effective, until January 2013, the Ethics Commission had not adopted any specific regulations setting out the procedures for enforcement of Sunshine Ordinance violations. Instead, the Ethics Commission took the position that previously adopted regulations (“Ethics Commission Regulations for Investigations and Enforcement Proceedings”) governing other types of investigations should also be applied to Sunshine Ordinance referrals. Those regulations, however, were adopted under a City Charter provision for Ethics Commission investigations and enforcements “relating to

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<sup>2</sup> Available online at <http://www.sfcourts.org/Modules/ShowDocument.aspx?documentid=2860>.

campaign finance, lobbying, conflicts of interest and governmental ethics.” (City Charter, § 15.102; Appendix C, § C3.699-13.) (See Supp. RJN, Ex.2.) Grossman and others argued to the Ethics Commission that those regulations did not govern its Sunshine Ordinance enforcement actions, and that the Ethics Commission needed new separate regulations tailored to the investigation and enforcement of Sunshine Ordinance actions.

In 2009, the Ethics Commission recognized the need for Sunshine Ordinance-specific regulations, and its staff began the process of drafting separate regulations governing (a) the enforcement of Sunshine Ordinance Task Force referrals of its Orders and (b) complaints filed directly with the Ethics Commission regarding willful violations of the Sunshine Ordinance. The development of those regulations extended over three years and, in the end, new regulations were not put in place until January 2013. The first drafts of the new regulations proposed by the Ethics Commission’s staff merely would have modified the existing Ethics Commission Regulations for Investigations and Enforcement Proceedings to accommodate Sunshine Ordinance matters. Later, when it became evident that modification would not be workable, the Ethics Commission took a different approach and its staff began drafting stand-alone regulations, which, in their final form, were called “Ethics Commission Regulations for Violations of the Sunshine Ordinance.”

For most of that long process, the Ethics Commission staff shared

drafts of the new regulations with the Sunshine Ordinance Task Force, which provided comments and suggestions prior to or in connection with consideration of the draft by the Ethics Commission itself. There were also three joint meetings between the Ethics Commission and members of the Sunshine Ordinance Task Force Committee with responsibility for reviewing the proposed regulations. That collaboration provided the Ethics Commission access to the expertise of the Sunshine Ordinance Task Force, and allowed the Sunshine Ordinance Task Force input into the implementation of the Ethics Commission's important role in enforcement of its referrals.

In late 2012, for unknown reasons, that changed. On September 14, 2012, without prior notice to the Sunshine Ordinance Task Force or its members, the Ethics Commission published notice that its staff had submitted another revised draft of the proposed regulations for consideration at the Ethics Commission's September 24, 2012 meeting. The lack of prior notice deprived the Sunshine Ordinance Task Force of the opportunity to provide input to the Ethics Commission or its staff. Moreover, because the Sunshine Ordinance Task Force did not have a scheduled meeting before the Ethics Commission was set to consider the proposed regulations, it was prevented from taking official action to review or comment on them.

Grossman and other advocates appeared at the Ethics Commission's

September 24, 2012 meeting and objected to the Sunshine Ordinance Task Force's exclusion from the process, without avail.

**C. GROSSMAN'S RECORD REQUEST**

In an effort to seek further information about the Ethics Commission's proposed draft for its September 2012 meeting and its failure to provide that draft to the Sunshine Ordinance Task Force for review, on October 3, 2012, Grossman submitted to St. Croix, in his capacity as Executive Director of the Ethics Commission, a public records request pursuant to the CPRA and Sunshine Ordinance seeking copies of certain public records relating to the Ethics Commission's draft regulations. Specifically, Grossman requested:

[C]opies of any and all public records ... in the custody or control of, maintained by or available to you, the Ethics Commission (Commission), any staff member or any Commissioner in connection with or with reference to:

(1) All prior drafts and final versions of (a) the September 14, 2012 draft of the Ethics Commission's regulations governing the handling of complaints related to alleged violations of the Sunshine Ordinance and referrals from the Sunshine Ordinance Task Force ("Draft Amendments") and (b) the September 14, 2012 staff report ("Staff Report") referred to in the [September 14, 2012] Commission Notice [and]

(2) the preparation, review, revision and distribution of all prior drafts and final versions of the Draft Regulations and Staff Report ....

(Exhibits in Support of Petition for Writ of Mandate and for Prohibition

(“Petition Exhibits”), p. 19.)

On October 12, 2012, the Ethics Commission responded to Grossman’s request and produced 123 electronic files, six of which were partially redacted. However, it informed Grossman that additional records were being withheld:

We are withholding other documents in their entirety, pursuant to California Government Code section 6254(k); California Evidence Code sections 952, 954; and California Code of Civil Procedure section 2018.030.

(Petition Exhibits, pp. 22-23.) The withheld public records were not identified in any way, including by category, and the response included no information about the number of records withheld. The statutory sections cited in the Ethics Commission’s letter define the attorney-client privilege (Evid. Code, §§ 952, 954), and the attorney work product protection (Code Civ. Proc., § 2018.030). The CPRA provision cited, Government Code section 6254(k), is not a privilege or exemption in itself but incorporates into the CPRA exceptions privileges, such as the above two, set out elsewhere in state or federal law.

On October 21, 2012, Grossman responded by letter challenging the Ethics Commission’s blanket assertion of privilege in support of its refusal to produce the withheld records. (Petition Exhibits, pp. 25-28.) Having received no response, he sent a follow-up email on November 1, 2012 requesting attention to his previous inquiry. (*Id.*, p. 30.) On November 2,

2012, St. Croix answered Grossman's email, stating that all responsive documents had been produced: "You have already received all documents responsive to your request." (*Id.*, p. 32.)

**D. GROSSMAN'S COMPLAINT AND THE SUNSHINE ORDINANCE TASK FORCE ORDER**

Faced with St. Croix's refusal to produce the requested public records, or to provide the required written justification for his assertion of privilege, Grossman filed a complaint against St. Croix with the Sunshine Ordinance Task Force on November 19, 2012. (Petition Exhibits, pp. 34-48.)

St. Croix responded to the Complaint by letter dated December 6, 2012. (Petition Exhibits, pp. 50-53.) In that response, St. Croix again claimed the attorney-client privilege and attorney work product exemptions, and asserted that his bare citation to the code sections setting out those privileges was sufficient to satisfy compliance with the Sunshine Ordinance's requirements for a written justification for any withholding. The Sunshine Ordinance Task Force conducted a hearing on the complaint at its June 5, 2013 public meeting, at which both Grossman and St. Croix appeared, spoke, and responded to questions from Task Force members. St. Croix testified that he did not know the number of records withheld, that he did not personally review them, and that he could not testify regarding which of those claimed exemptions would apply to any or which

withheld record.

In a written Order of Determination dated June 24, 2013, the Sunshine Ordinance Task Force held that St. Croix violated Sections 67.21 (b) and 67.24(b)(1) of the Sunshine Ordinance by improperly withholding records subject to disclosure, and ordered him to produce them to Grossman. (Petition Exhibits, pp. 55-56.) St. Croix did not comply with that order. (*Id.*, p. 9, line 20.)

On November 21, 2013, the Sunshine Ordinance Task Force referred Mr. St. Croix's non-compliance with its June 24, 2013 Order to the Ethics Commission. To date, the Ethics Commission has not acted on it. (See Supp. RJN, Ex. 3 [Agendas and minutes from Ethics Commission meetings from June 24, 2013 through present].)

During the pendency of this dispute, at its November 2012 meeting, the Ethics Commission adopted the Ethics Commission Regulations for Violations of the Sunshine Ordinance. The regulations took effect January 25, 2013.

#### **E. THE SUPERIOR COURT'S ORDER**

On September 18, 2013, Grossman filed a verified petition for a writ of mandate ("Petition") in the Superior Court below seeking an order compelling Petitioners to produce the public records he had requested nearly a year earlier. (Petition Exhibits, p. 1.) Petitioners filed a written opposition, in which they admitted that four documents were improperly

withheld. (*Id.*, p. 104, ¶ 6.) Petitioners' opposition also specified, for the first time, that 24 documents had been withheld on the basis of attorney-client privilege and the attorney work product doctrine, consisting of 15 requests from the Ethics Commission's staff to the City Attorney's Office for legal advice concerning the proposed regulations, and nine documents allegedly including legal advice from the City Attorney's Office in response. (*Id.*, p. 104 ¶ 7.)

The matter came before the Superior Court for hearing on October 25, 2013. On October 29, 2013, the court issued the order requested by Grossman, requiring Petitioners to produce the requested documents. (Petition Exhibits, pp. 204-206.) Petitioners did not produce the records. On November 22, 2013, the City filed this Petition for Peremptory Writ of Mandate and/or Prohibition under California Government Code section 6259(c), along with a Motion to Stay under California Government Code section 6259(c).

### **III. ARGUMENT**

#### **A. CALIFORNIA LAW PROVIDES FOR BROAD PUBLIC ACCESS TO GOVERNMENT RECORDS**

The California Constitution enshrines a broad right of public access to government records:

The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open

to public scrutiny.

(Cal. Const., art. I, § 3.) In the CPRA, the Legislature called public access to government records a “fundamental and necessary right”:

In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.

(Gov. Code, § 6250.) Therefore, the CPRA provides that “every person has a right to inspect any public record.” (Gov. Code, § 6253.)

“Public records” are broadly defined to include “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” (Gov. Code, § 6252, subd. (d).)

Section 6253(b) of the CPRA requires disclosure of non-exempt public records upon request:

Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(Gov. Code, § 6253(b).)

**B. AS AUTHORIZED BY THE CPRA, THE VOTERS OF SAN FRANCISCO ELECTED TO BROADEN ACCESS TO PUBLIC RECORDS**

Though the CPRA provides for certain exemptions to disclosure, the California Constitution mandates that any such limitation be construed narrowly, in favor of public access:

A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(Cal. Const., art. I, § 3, subd. (b)(2); see also *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 312-13 [reaffirming mandate that exemptions to public disclosure be construed narrowly].) Courts have called those narrow statutory exceptions to that complete right of access “islands of privacy upon the broad seas of enforced disclosure.” (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 653 [117 Cal.Rptr. 106].)

Binding on municipalities and local agencies, the CPRA's right of access operates as a floor, not a ceiling—the law expressly authorizes any local government to “adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set out in [the CPRA.]” (Gov. Code, § 6253, subd. (e).) The

provision at issue here, Sunshine Ordinance section 67.24(b)(1)(iii), is one that provides “greater access.” As expressly authorized by the CPRA, the San Francisco voters opted to shrink one of the islands of privacy by precluding San Francisco agencies from invoking certain statutory exceptions for public records falling within certain narrowly defined subject areas, namely, the laws governing ethics and public access. Through the Sunshine Ordinance, the voters of San Francisco provided “enhanced rights of public access to information and records” with respect to “[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or [the Sunshine] Ordinance.” (San Francisco Admin. Code, § 67.24, subd. (b)(1)(iii)) (See Supp. RJN, Ex. 1.)<sup>3</sup>

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<sup>3</sup> The Sunshine Ordinance also empowers the Sunshine Ordinance Task Force to determine when there has been a violation of the Ordinance, and to issue orders requiring compliance. (San Francisco Admin. Code, § 67.21, subd. (e).) (See Supp. RJN, Ex. 2.) Pursuant to that authority as a quasi-judicial body, the Sunshine Ordinance Task Force June 24, 2013 Order of Determination finding a violation of Sunshine Ordinance sections 67.21(b) and 67.24(b)(1), and ordering St. Croix to produce the requested records should be given deference. To do otherwise would undermine the complaint, hearing and referral process of the Sunshine Ordinance, which was intended to give requesting parties an efficient process for resolution of public records complaints. Deference is particularly warranted here, where Petitioners did not raise the defenses on which they now rely until after Grossman filed a mandamus action in the Superior Court. Toleration of

**C. THERE IS NO CONFLICT BETWEEN THE CITY CHARTER  
AND THE SUNSHINE ORDINANCE**

Petitioners concede that the records requested by Grossman fall within the scope of Sunshine Ordinance section 67.24(b)(1)(iii). They argue, however, that the provision is invalid because it conflicts with the City Charter sections 6.100 and 6.102. (Petition at p. 28.) There is no conflict.

City Charter section 6.100 merely designates the City Attorney as counsel and provides that he or she will have “such additional powers and duties prescribed by state laws for their respective office.” (See Supp. RJN, Ex. 2.) Section 6.102 sets out certain duties for the City Attorney, including “provid[ing] advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County.” (See Supp. RJN, Ex. 2.) Section 67.24(b)(1)(iii) requires that certain categories of public records—those relating to public records laws

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such sandbagging would encourage dragged-out litigation and further encumber the judicial system. Petitioners call the Task Force merely “advisory,” but the Sunshine Ordinance clearly empowers the Task Force to “order” production of public records, providing that enforcement of the order must be undertaken by the district attorney or an agency with independent enforcement power. (San Francisco Admin. Code, § 67.21, subd. (e).) (See Supp. RJN, Ex. 1.) The section cited by Petitioners describes the Task Force’s *separate* responsibility for providing advice to city agencies on Sunshine Ordinance Matters. (San Francisco Admin. Code § 67.30, subd. (c).) (See Supp. RJN, Ex. 1.)

themselves—be publicly accessible. (See Supp. RJN, Ex. 1.) The two laws can be read in perfect harmony. The City Attorney may carry out his or her duties, but when communicating or providing advice about public records laws, must do so in a manner that is publicly accessible manner.

The City Charter is silent with respect to the confidentiality of communications with the City Attorney, and nowhere mentions the attorney-client privilege. None of its provisions mandate that communications with the City Attorney take place within the boundaries of privilege. Petitioners would have the Court read into that silence a blanket requirement that all such communications are confidential, and in doing so *create* a conflict with the express provisions of the Sunshine Ordinance, which was adopted by the same electorate a few years later.<sup>4</sup> The Court should not strain to find a conflict where none exists; to the contrary, it

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<sup>4</sup> The Charter specifically contemplates otherwise by including a “Right to Know” provision. City Charter section 2.108 provides that “The Board of Supervisors shall adopt and maintain a Sunshine Ordinance to liberally provide for the public’s access to their governmental meetings, documents and records.” (See Supp. RJN, Ex. 2.) The Sunshine Ordinance, originally adopted in 1993, was amended in 1999 by the voters, via Proposition G to provide access to documents and records, as recognized by the City Charter. The Voter Information Pamphlet for the proposition specifically stated that adoption of the amendment would mean that the “City Attorney could not give confidential advice to City officers or employees on matters concerning government ethics, public records and open meeting laws.” (See City and County of San Francisco Voter Information Pamphlet and Sample Ballot (11/2/99) <[http://sfpl.org/pdf/main/gic/elections/November2\\_1999short.pdf](http://sfpl.org/pdf/main/gic/elections/November2_1999short.pdf) [as of March 7, 2014].)

should strive for interpretations of statutes that *avoid* conflict and do not render laws invalid. (*People v. Kennedy* (2001) 91 Cal.App.4th 288, 297 [110 Cal.Rptr.2d 203] ["It is our duty when interpreting statutes to adopt, if possible, a construction which avoids apparent conflicts between different statutory provisions, even if the provisions appear in different codes" (citations omitted)]).<sup>5</sup>

Not only would such a construction bring the two municipal provisions into conflict, it would *narrow* Petitioners' obligation to allow public access to records. The California Constitution, obviously superior to any local law, expressly requires that "[a] statute...shall be broadly

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<sup>5</sup> Because there is no conflict, *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161 [36 Cal.Rptr.2d 521] is inapposite. In that case, the court examined whether a city charter precluded the city from implementing a program requiring bidders to engage in certain conduct as part of the competitive bid process where the charter contained no provision expressly allowing this program. In determining whether the implementation of the program conflicted with the charter, the court first "construe[d] the charter in the same manner as [it] would a statute...to ascertain and effectuate legislative intent...look[ing] first to the language of the charter, giv[ing] effect to its plain meaning..." (*Id.* at 171-172.) The court explained that since the charter did not expressly authorize or forbid the city from adopting the program, "the validity...must be ascertained with reference to the purpose" of the program." (*Id.* at 173.) The court found that there was no conflict because the program was compatible with the charter's provisions regarding bidding. Here, the purpose of the Sunshine Ordinance is not incompatible with the Charter's designation of privilege. Nothing in the Charter indicates that *all* communications between the City Attorney and his or her clients are necessarily privileged. In fact, it provides otherwise by recognizing the purpose of the Sunshine Ordinance. (See, *supra*, note 4.) Reading the Charter to contain such an implication does not give effect to its plain meaning.

construed if it furthers people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2); see also *Sander, supra*, 58 Cal.4th at 312-13.)<sup>6</sup>

**D. THERE IS NO CONFLICT BECAUSE ATTORNEY-CLIENT COMMUNICATIONS ARE NOT NECESSARILY CONFIDENTIAL**

Petitioners' argument rests on the mistaken premise that *all* communications with an attorney are *necessarily* confidential. They contend, "Because confidentiality is well-understood to apply to the attorney-client relationship and because it is fundamental to that relationship, the voters necessarily intended that the privilege apply to the City Attorney's advice." (Petition at p. 21.) However, it is plain that communications with attorneys, including advice and requests for advice, are very often non-confidential.

That is particularly apparent for public sector lawyers, who are subject to mandates that *require* them to provide certain types of advice in settings that must be accessible to the public. For example, this state's Brown Act mandates that meetings of local legislative and other bodies be conducted in the open, including any communications with counsel not

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<sup>6</sup> Moreover, the Sunshine Ordinance specifically requires a narrow reading of the City Charter. (See San Francisco Admin. Code § 67.1 ["Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority."].) (See Supp. RJN, Ex. 1.)

related to pending litigation. (Gov. Code, § 54956.9.) Even when the purpose of a local legislative body's communications is "to confer with, or receive advice from ... legal counsel," the body's sessions may go into closed session only if "open session concerning those matters would prejudice the disposition of the local agency in the litigation." (*Id.*) In other words, the Brown Act mandates that *most* attorney-client communications with a local legislative body take place in *open* session. When the advice being sought or provided by the attorney does not concern pending litigation, that attorney-client communication must be in public. (See, e.g., *Stockton Newspapers, Inc. v. Members of Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105 [214 Cal.Rptr. 561] [no exemption where "purpose of the communications with the attorney is a *legislative* commitment"].)<sup>7</sup>

Petitioners misconstrue the significance of Grossman's reference to the above provisions of the Brown Act. This case is not about the boundaries of the Brown Act, nor the distinction it draws between communications relating to pending litigation and other advice. The point of Grossman's reference to the above provisions is to demonstrate that confidentiality of attorney-client communications is not fundamentally

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<sup>7</sup> The provision is sometimes referred to as a legislative abrogation of the attorney-client privileges. (*Shapiro v. Bd. of Directors of Ctr. City Dev. Corp.* (2005) 134 Cal.App.4th 170, 174 [35 Cal.Rptr.3d 826].)

necessary to the provision of legal advice, and illustrative of the fact that California attorneys have decades of experience providing effective legal advice to clients in circumstances where the law requires that the advice remain publicly accessible. In San Francisco, the City Attorney routinely provides advice to the Board of Supervisors, the Ethics Commission, and other city boards in open session, as do lawyers representing every other California municipality. The Brown Act's public meeting requirements also demonstrate that the California Legislature, which is the sole source of the state's attorney-client privilege and attorney work product protection, shares the view that the effective provision of legal advice to a municipal body does not *require* confidentiality.

The practical compatibility of the attorney-client relationship and open access for the public is further illustrated by the fact that other states have gone much further in eliminating privilege for public entities. In *Neu v. Miami Herald Pub Co.* (Fla. 1985) 462 So.2d 821, 823, for example, the Florida Supreme Court held that the state's Sunshine Law mandated access to a meeting between a city council and the city attorney for the purpose of discussing the settlement of pending litigation in which the city was a party. It expressly rejected the contention that the statutory provision providing for the confidentiality of attorney-client communications mandated a different result, holding that "[t]he Sunshine Law explicitly provides for public meetings; communications at such public meetings are not

confidential and no attorney/client privilege can arise therefrom.” (*Id.* at 824.) (See also *City of North Miami v. Miami Herald Pub. Co.* (Fla. 1985) 468 So.2d 218, 219) [no exemption under Florida’s Public Records Act for access to an attorney’s written advice]; *Arkansas Highway and Transp. Dept. v. Hope Brick Works, Inc.* (1988) 294 Ark. 490, 495 [744 S.W.2d 711, 714] [explaining that attorney-client privilege is not an exemption to the Arkansas’s Freedom of Information Act].)<sup>8</sup>

**E. A LAWYER’S OBLIGATION TO MAINTAIN CONFIDENCES  
DOES NOT CONVERT NON-CONFIDENTIAL  
COMMUNICATIONS TO CONFIDENTIAL ONES**

Petitioners erroneously attempt to bootstrap the City Charter’s general statement that the City Attorney is “subject to the ‘duties prescribed by state laws’” (Petition at 26) into a mandate that trumps the Sunshine Ordinance. It does not.

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<sup>8</sup> Academic studies agree that an attorney’s representation of a public entity client can be fulfilled in an environment where the attorney-client privilege has been limited or altogether eliminated. The author of the leading treatise on the attorney-client privilege wrote, “Under the logic of open meetings, sunshine, and freedom of information acts, seven states” have abolished the attorney-client privilege altogether. (Paul R. Rice, *The Government’s Attorney-Client Privilege: Should It Have One?*, Pub. Couns. Newsletter, (Md. St. B. Ass’n, Baltimore, MD), <http://www.acprivilege.com/articles/acgov.md.htm> [cited in Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys* (2007) 20 Geo. J. Legal Ethics 163, 183].) He notes, “Significantly, there have so far been no reported adverse consequences from this action.” (*Id.*)

Petitioners cite the State Bar Act, which requires an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client,” (Cal. Bus. & Prof. Code, § 6068, subd. (e)(1)); Rule of Professional Conduct 3-100 [prohibiting disclosure of client confidences].) But neither section answers the antecedent question of whether information is confidential in the first place. Because Sunshine Ordinance section 67.24(b) requires that advice on the specified topics be publicly accessible, that advice is never confidential from the outset. A lawyer cannot maintain in confidence information that is not confidential, and is under no obligation to do so. The Court should reject Petitioners’ invitation to over-read a requirement to keep confidences into an expansion of privilege to cover non-confidential information.<sup>9</sup>

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<sup>9</sup> The City Attorney’s own “Good Government Guide” recognizes:

[L]egal advice on ethics laws and open government laws may not be confidential for another reason. The Sunshine Ordinance provides that notwithstanding any exemption provided by law, any written legal advice about conflicts or open government laws may not be withheld from disclosure in response to a public records request. Accordingly, the practice of the City Attorney’s Office is to inform any officer or employee who requests such advice in writing that the advice may be subject to disclosure upon request by a member of the public.

(See Request for Judicial Notice in Support of Opposition to Petition for Peremptory Writ of Mandate, filed 12/23/13 (“RJN”), Ex. 4. at pp.22-23.)

In addition, Petitioner's logic is backward. Petitioners are not lawyers, they are clients; Grossman's requests were not to the City Attorney, but to a city agency and official. What an attorney is or is not required to do says nothing about his or her client's separate legal obligation to produce information. Statutory or regulatory provisions governing an attorney's duty of confidentiality have no bearing on the principal's duties. The arguments made by Petitioners here have been rejected by other courts addressing similar claims. For example, in *Dist. Atty. for Plymouth Dist. v. Bd. of Selectmen of Middleborough* (1985) 395 Mass. 629, 633-34 [481 N.E.2d 1128, 1131] the Massachusetts Supreme Judicial Council (the Commonwealth's highest court) ruled that a municipal board could not invoke the attorney-client privilege to create an exception to the state's open meeting law: "We view § 23B as a statutory public waiver of any possible privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute." (*Id.* at 1131.) The Court expressly held that the law did not require attorneys to violate their ethical duties because the "attorney-client privilege is the client's privilege to waive," meaning that if "a client

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chooses to waive the privilege of confidentiality, the attorney is under no further ethical obligation to keep the communications secret.” (*Ibid.*)<sup>10</sup>

**F. THE RECORD DOES NOT SUPPORT A CONCLUSION THAT THE SUNSHINE ORDINANCE IMPERMISSIBLY INTERFERES WITH THE CITY ATTORNEY’S DUTIES**

Petitioners further contend that Section 67.24 (b)(1)(iii) is at odds with the City Charter because it prevents the City Attorney from carrying out his duties as attorney for the City and its agencies. Those “interference” arguments are grossly exaggerated, and wholly unfounded. Section 67.24 (b)(1)(iii) merely provides that communications on certain

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<sup>10</sup> Petitioners over-read the cases they cite in support of the proposition that the Court should infer from the City Charter the voters’ intent to require that all communications between the San Francisco officials and the City Attorney remain confidential. (See Petition at p. 21 (citing *Johnston v. Baker* (1914) 167 Cal. 260, 264 [139 P. 86] and *Currieri v. City of Roseville* (1970) 4 Cal.App.3d 997, 1001 [84 Cal.Rptr. 615]).) In *Johnston*, the court indicated that a statute authorizing the court in its discretion to dismiss an action two years after an answer was filed necessarily implied that a court could order dismissal at any time prior to the expiration of two years as well. In *Currieri*, the city charter provided that the probation period for a city employee would not exceed one year before the employee’s appointment becomes permanent, “carry[ing] with [it] the necessary implication that the probationary employee, although he may be discharged summarily at any time during the probationary year, thereafter automatically attains a permanent status.” (*Currieri, supra*, at p. 1001.) In both *Johnston* and *Currieri* inferences drawn flowed logically from the statutes. Here, in contrast, an unwritten mandate that all attorney-client communications remain confidential cannot be logically deduced from the mere appointment of the City Attorney. Of course, when the voters actually spoke they did so directly and clearly in the form of the express words of the Sunshine Ordinance.

subject matters, namely those pertaining to open government laws, remain accessible to the public. It is not a reorganization of the relationship between the City Attorney and his clients, nor is openness fundamentally incompatible with the attorney-client privilege.<sup>11</sup>

Absolutely nothing in the factual record supports Petitioners' bare assertion that section 67.24 (b)(1)(iii) would impermissibly interfere with the carrying out of the City Attorney's duties. In the trial court Petitioners offered no evidence that would show that a minimal requirement that limited categories of communications remain publicly accessible would *actually* prevent the City Attorney from carrying out his duties, and as a result can point to no facts in the record to support their position.

Instead, Petitioners rely on quotations from cases extolling the virtue of confidentiality in the attorney-client relationship. (See Petition at pp. 22-23 (citing *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146 [86 Cal.Rptr.2d 816, 980 P.2d 371]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1207 [40 Cal.Rptr.2d 456,

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<sup>11</sup> San Francisco Administrative Code section 67.24 contains other provisions precluding San Francisco agencies from asserting CPRA exemptions that have not been challenged by the City. For example, Section 67.24(c) allows disclosure of a broad range of personnel information, Section 67.24(h) precludes assertion of the deliberative process privilege, and Section 67.24(g) precludes reliance on the CPRA's "catch-all" provision. (See Supp. RJN, Ex. 1.) To Grossman's awareness, those provisions have not been attacked.

892 P.2d 1199]; *Hunt v. Blackburn* (1888) 128 U.S. 464, 470 [9 S.Ct. 125, 32 L.Ed. 488]).) Precedent acknowledging the value of confidentiality in the attorney-client relationship does not, however, provide a basis for defeating the lines drawn by the voters establishing which of their elected officials' communications should and should not remain confidential.

*Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs* (1967) 255 Cal.App.2d 51 [62 Cal.Rptr. 819] warns against exactly that overextension, holding that while government officials had an interest in being able to communicate confidentially with attorneys, that should not be construed to allow a broad (and limitless) assertion of privilege to defeat specific mandates that public information remain available to the public:

Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash.

(*Sacramento Newspaper Guild, supra*, 255 Cal.App.2d at p. 58.) The fact that confidentiality can play an important role in the effective provision of legal representation is not disputed, but also insufficient to support the broad proposition that confidentiality is an essential prerequisite to legal representation. Whatever the virtues of confidentiality in the attorney-

client relationship, there is no overarching mandate that *every* communication between a client and his or her attorney be confidential.

**G. PETITIONERS' INAPPOSITE CASES DO NOT SUPPORT THEIR POSITION**

Petitioners place heavy reliance on *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363 [20 Cal.Rptr.2d 330, 853 P.2d 496], erroneously arguing that in that case “the California Supreme Court rejected an argument similar to Grossman’s.” (Petition at p. 24.) The *Roberts* Court never considered the issues raised here, and the case has no bearing on these facts. In *Roberts*, the Supreme Court considered plaintiff’s contention that the Brown Act’s open meeting provision, which expressly abrogated attorney-client privilege for oral communications, also mandated production of written communications pursuant to a CPRA request. Rejecting that position, the Court stated: “We see nothing in the legislative history of the amendment suggesting the Legislature intended to abrogate the attorney-client privilege that applies under the Public Records Act, or that it intended to bring written communications from counsel to governing body within the scope of the Brown Act’s open meeting requirements.” (*Roberts, supra*, at 377.) The Court declined to find abrogation by implication or to narrow the privilege on its own authority.

Neither the holding of the case nor its reasoning apply here. *Roberts* clarifies that the Brown Act does not limit the CPRA’s exemption for

written communications covered by the attorney-client privilege. The scope of disclosure mandated by the CPRA is not directly at issue here, but rather the scope of disclosure required by the Sunshine Ordinance—again, a local law enacted pursuant to the CPRA’s provision allowing an expansion of rights to public records. The Sunshine Ordinance recognizes that it broadens access, and expressly states that the types of records at issue must be produced “[n]otwithstanding a department’s legal discretion to withhold certain information under the California Public Records Act.” (San Francisco Admin. Code, § 67.24 (emphasis added).) (See Supp. RJN, Ex. 1.) Thus, while *Roberts* may provide that the records at issue here need not be produced under the CPRA, the Sunshine Ordinance directly states that they must be.

Similarly, *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766 [190 Cal.Rptr. 919, 661 P.2d] answers a question not asked here. In that case, the Supreme Court held that clients in welfare proceedings were entitled to privilege even though their representatives were not attorneys. Petitioners argue that because the Court found that the establishment of the relationship implied the creation of a privilege, that the appointment of the City Attorney to act for San Francisco agencies must necessarily include a mandate that communications between them be privileged. But there is no question that the relationship between a municipal attorney and a client agency or official is of the type that may give rise to privilege. The issue

here is not whether attorney-client communications are entitled to privileged generally, but whether they are *always* or *necessarily* confidential. *Welfare Rights* provides no guidance to answering that question.

**H. PETITIONERS CANNOT SHOW WHY DISCLOSURE OF *THESE* COMMUNICATIONS WOULD IMPEDE THE CITY ATTORNEY'S REPRESENTATION**

The premise that the City Attorney cannot carry out his duties if his client may be under an obligation to make those communications public is simply wrong, and wholly incompatible with the California Legislature's judgment in the Brown Act context that an attorney's advice to local bodies *should* be carried out in public. The subject matter of Grossman's request epitomizes the type of advice that does not depend on confidentiality. He sought drafts and final versions of the Ethics Commission's regulations governing the handling of Sunshine Ordinance matters, the associated staff report, and records relating to the "preparation, review, revision and distribution" of the drafts and staff report. The drafting of procedural regulations is akin to a legislative function—different members of the public may have different views about what the procedures should look like, but the process is fundamentally non-adversarial. No unfair advantage would be conferred by giving the public an insight into the City Attorney's views on different versions. Notably, at the most recent Ethics Commission meeting, the Deputy City Attorney provided legal advice in

open session on further proposed changes to the Sunshine Ordinance regulations at issue.

Petitioners argue that “the abrogation of the privilege significantly impedes the City Attorney’s function.” (Petition at p. 30.) Petitioners recite a parade of horrors that might ensue if litigation adversaries could attack the attorney-client privilege through Sunshine Act or CPRA requests. Whatever justification might be found for limiting disclosure in the context of active litigation, those admittedly trickier circumstances are not found here. The drafting of regulations is a process that should be open, and the provision of candid, honest, well-reasoned and complete legal advice in connection with that process is not impeded by disclosure. There is no reason to believe the questions to the City Attorney or his answers would be any different regardless of whether communications were public or private. The Court need not reach the issue of whether a litigation exception should be read into the law, and need only apply the law as written.<sup>12</sup>

Petitioners cite *Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684 [52 Cal.Rptr.2d 161], a case where

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<sup>12</sup> . Petitioners erroneously contend that Grossman is advocating that the Court draw a distinction between communications relating to active litigation and those that are not. To the contrary, he is arguing that the Court need not address a potential exemption based on facts not before it.

the court held that a city council could not impair the city attorney's charter duties through a budget ordinance and that only voters could change the city attorney's duties by amending the city's charter, to argue that the San Francisco City Charter controls in this case. Here, however, the Sunshine Ordinance did not constitute a change to the city attorney's *duties*. It merely requires that a certain category of documents be made available for public review, taking those documents out of the potential realm of privilege. That does not conflict with any duty set out in the City Charter, as the Charter does not require or mandate that all communications between an attorney and client be privileged and confidential in the first place.

**I. IF THERE WAS A PRIVILEGE, THE VOTERS COULD WAIVE IT**

Because San Francisco law requires that the public records at issue be made public, they were never confidential in the first place, and no privilege ever attached. The waiver of privilege is therefore a misleading and inapposite frame of reference here. But if disclosure here were viewed as a waiver of privilege, it is clear that the voters of San Francisco were empowered to make that waiver.

Whatever difficulty a municipal lawyer might have in ascertaining who holds the power to waive the City's privilege dissolves when the voters speak through the ballot box. The California Constitution states: "All political power is inherent in the people." (Cal. Const., art. II, § 1.) The San Francisco City Charter grants plenary legislative power through

direct action by the voters, providing that “the voters of the City and County shall have the power to enact initiatives and the power to nullify acts or measure involving legislative matters by referendum.” (City Charter, §14.100.) (See Supp. RJN, Ex. 2.) The Sunshine Ordinance was a valid and proper exercise of that authority.

In addition, as discussed above, local enactments like Sunshine Ordinance section 67.24 (b)(1)(iii) are expressly authorized by the CPRA. (Gov. Code, § 6253, subd. (e).) It is indisputable that state law supersedes local law. (*Candid Enterprises, Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 885 [218 Cal.Rptr. 303, 705 P.2d 876] [(“If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.”)].) Whatever the hierarchical relationship between a general provision of the City Charter and a detailed, specific enactment by the voters directly, the fact that the pertinent section here was authorized by express state law renders the debate of no significance.

Again, privilege is the wrong frame for this analysis because the voters’ directive here is not to the *attorney*, but to the city officials who work for and on behalf of the voters. It may be that the City Attorney is bound not to disclose privileged information, and to act zealously on behalf of his clients, but that says nothing about whether those clients may choose to give up their right to confidentiality. The voters’ plenary legislative

authority includes the power to compel their own officials to waive privilege.<sup>13</sup>

Petitioners' arguments to the contrary do not survive scrutiny. They ask, "[I]f voters could withdraw the privilege by ordinance in regard to the matters mentioned above, why could they not do the same for any subject on which the City Attorney advises City officials?" (Petition at p. 31.) They contend that the Sunshine Ordinance might be construed to allow an adversary to access litigation strategy, or to undermine the obligation of the City to provide a defense to individual police officers. (*Id.*) But this Court need not address the boundaries of extreme situations raised only hypothetically here. Petitioners suggest that this is a slippery slope, but it is not. There may be circumstances where the right of public access conflicts with other individual rights in other situations, but those issues are not raised here, and remain, if anything, a question for another day.<sup>14</sup>

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<sup>13</sup> Any distinction between attorney work product and attorney-client privilege makes no difference here. As a preliminary factual matter, some of the documents at issue are *requests for advice to the Deputy City Attorney*, so they cannot be work product. Second, these requests were to clients, not to the attorneys. Petitioners overstate the law by suggesting that clients may not disclose advice received from their attorney that happens to contain work product without the attorneys' consent. The law is clear that "an attorney's work product belongs absolutely to the client." (*Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950 [203 Cal.Rptr. 879].)

<sup>14</sup> If anything, it is Petitioners' position that creates far-reaching implications. If Petitioners' position is sustained, and there is a finding of privilege here, that would effectively eliminate the Ethics' Commissions

Finally, Petitioners place great weight on the alleged differences between the process for instituting an amendment to the City Charter and the voters initiating and adopting an ordinance or other law. Though there are some procedural differences for placing the matter on the ballot, the fact remains that simple majority voter approval is required for both. The Sunshine Ordinance was passed by a majority of the San Francisco voters, whose express will would be undone by the action (taken on the ostensible authority) of their own elected officials here. The Court should strive to give effect to their will here, not strain to read words into statutory silence to find a conflict that it must then resolve.

**J. PETITIONERS IMPROPERLY ASSERT THIS WRIT**

This writ purports to be filed on behalf of the Ethics Commission and its Executive Director. The Ethics Commission has not, however, authorized this proceeding, and public records indicate that it may not even be aware it was filed. (See Supp. RJN, Ex. 3.) For that reason alone, the Petition is void and should not be considered.

To bring this Petition, Petitioners were required to follow proper procedure laid out by the Brown Act. The decision to file this Petition is an

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jurisdiction, under section 67.34(d), to enforce an action for enforcement or penalties under the Sunshine Ordinance, putting the Ethics Commission in violation of its own bylaws (which require that any change to the bylaws be done through written proposed amendments, under Article XII).

“action taken” under the Brown Act because it is “a collective commitment...of a legislative body to make a positive...decision.” (Gov. Code, § 54952.6.) Before taking such an “action” the Ethics Commission is required to comply with Section 54954.2(a) of the Act, which requires, among other things (1) posting an agenda at least 72 hours before the meeting containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in a closed session, and (2) that no action or discussion shall be undertaken on any item not appearing on the posted agenda. Should the action involve litigation and should the legislative body have a need to hold a closed session to discuss that litigation, it must first announce that closed session and identify the litigation to be discussed. (Gov. Code, § 54956.9.) The Ethics Commission’s bylaws specifically require that it abide by this provision. (*See* Article I, Section 3 [“The Commission shall comply with all applicable laws, including, but not limited to, the San Francisco Charter, San Francisco Sunshine Ordinance...the Ralph M. Brown Act...”].) (*See* RJN, Ex. 3.)

None of the required steps were taken. While the writ is taken in the name of the Ethics Commission, the Ethics Commission did not actually bring it. Because the Ethics Commission has never authorized this Petition or taken the action necessary to initiate and maintain it, the Court ought to deny it outright.

#### IV. CONCLUSION

For the foregoing reasons, the Court should not invalidate a key provision of the Sunshine Ordinance allowing for the disclosure of documents requested by Grossman. Grossman respectfully requests that this Petition be denied and that Petitioners be compelled to make the requested public records immediately available.

DATED: March 7, 2013

**KERR & WAGSTAFFE LLP**

By: 

MICHAEL J. KERR

*Attorneys for Allen Grossman*

**CERTIFICATION OF COMPLIANCE WITH WORD LIMIT**

Pursuant to Rule of Court 8.204(c)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 9,068 words.

DATED: March 7, 2014

**KERR & WAGSTAFFE LLP**



JASMINE K. SINGH  
*Attorneys for Allen Grossman*

## PROOF OF SERVICE

I, Brandilynn Thomas, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 100 Spear Street, 18th Floor, San Francisco, California 94105.

On March 7, 2014, I served the following document(s):

**SUPPLEMENTAL OPPOSITION TO PETITION FOR  
PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION  
[CALIFORNIA GOVERNMENT CODE SECTION 6259(C)]**

on the parties listed below as follows:

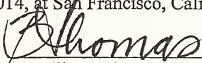
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- ☒ By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.
- ☒ By electronic submission by submitting a text searchable Portable Document Format ("PDF") via the Court of Appeal online form to the Supreme Court of California pursuant to CRC 8.212(c).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 7, 2014, at San Francisco, California.

  
\_\_\_\_\_  
Brandilynn Thomas



COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

JOHN ST. CROIX, EXECUTIVE  
DIRECTOR, SAN FRANCISCO  
ETHICS COMMISSION; and SAN  
FRANCISCO ETHICS COMMISSION,

Petitioners/Respondents,

vs.

SUPERIOR COURT OF CALIFORNIA  
FOR THE CITY AND COUNTY OF  
SAN FRANCISCO,

Respondent/Appellant.

---

ALLEN GROSSMAN,

Real Party in Interest.

---

Case No. A140308

San Francisco County Superior  
Court No. CPF-13-513221

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**SUPPLEMENTAL REPLY TO  
SUPPLEMENTAL OPPOSITION TO  
PETITION FOR PEREMPTORY WRIT OF  
MANDATE AND/OR PROHIBITION  
[CALIFORNIA GOVERNMENT CODE  
SECTION 6259(c)]**

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The Honorable Ernest H. Goldsmith

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Grossman's supplemental opposition fails to respond to many of the arguments in the City's previously filed Petition and Reply. Accordingly, the City relies primarily on those briefs. A few short points bear emphasis here:

**1. The Charter is not "silent" on attorney-client privilege.**

Section 6.100 requires the City Attorney to carry out his duties of representing and advising the City and its officials subject to "powers and duties prescribed by state laws for [his office]," including the paramount duty of confidentiality. Section 6.100 thus expressly confers on the City Attorney the duty to protect confidential information subject to the attorney-client privilege (Evid. Code §§ 954, 955) and work product doctrine (Code Civ. Proc. §§ 2018.020, 2018.030). (*See* Petition at 26-27; *see also People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 640 [city attorney is "public officer invested with all the rights and privileges and subjected to all of the limitations and restrictions imposed by the Constitution and laws of this state and considerations of public policy"]; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 157 [public attorney subject to same Rules of Professional Conduct as applied to all other attorneys].) And regardless, the Charter necessarily implies the privilege, because a municipality "needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel." (*Roberts v. Palmdale* (1993) 5 Cal.4th 363, 380; *see also* Petition 23-25.) That which is necessarily implied is "as much a part of [the Charter] as that which is expressed." (Petition at 21 [quoting *Johnson v. Baker* (1914) 167 Cal. 260, 264].) Thus, Grossman's assertion that "[t]he City Charter is silent" as to the privilege (Supplemental Opposition ["Supp. Opp."] at 3, 19) is both wrong and irrelevant.

## 2. The Charter trumps initiative ordinances.

Grossman suggests that because they are adopted by a majority of voters, voter-enacted initiative ordinances are the same as voter-enacted Charter amendments and are thus on equal footing with the Charter. This false premise underlies Grossman's arguments that the Charter should be construed to avoid a conflict with the Sunshine Ordinance (Supp. Opp. at 19) and that the voters may choose, by ordinance, to decide that certain attorney-client communications are not confidential. (*Id.* at 25, 29, 34-37.)

Grossman again ignores the San Francisco Charter, which provides that the City "may make . . . all ordinances . . . in respect to municipal affairs, *subject . . . to the restrictions and limitations provided in this Charter.*" (Petitioners' Request for Judicial Notice in Support of Supplemental Reply, Exh. A [S.F. Charter § 1.101; emphasis added].) Thus, all ordinances – whether adopted by the Board of Supervisors or by the voters – are subordinate to the Charter. The Charter is the City's "constitution" and the "supreme law of the municipality." (*Michael Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1021.) To the extent there is a conflict, an initiative ordinance must give way to the Charter. (*See, e.g., City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 102.) The Charter and state law distinguish initiative ordinances from Charter amendments (*see* S.F. Charter § 1.101; Petition at 13), and Grossman's arguments premised on his refusal to acknowledge the difference must necessarily be rejected. (Reply at 9-12, 15-16.)

## 3. Sunshine Ordinance section 67.24(b)(1)(iii) unavoidably conflicts with the Charter.

Grossman asserts that the Sunshine Ordinance does not conflict with the Charter because the Court can construe the Charter narrowly as not

requiring that all attorney-client communications be confidential. (*See, e.g.,* Supp. Opp. at 19.) Indeed, Grossman goes so far as to argue that “the Sunshine Ordinance specifically requires a narrow reading of the City Charter.” (*Id.* at 21 n.6.) In a similar vein, Grossman implies that the Charter should be read as incorporating the attorney-client privilege only where the privilege is shown to be “fundamentally necessary to the provision of legal advice.” (*Id.* at 22-23.)

These arguments make no sense. (*See* Reply at 9-10.) Statutes and ordinances are construed, when possible, to avoid conflicts with the Constitution or Charter. Grossman cites no authority for the proposition that courts should narrowly construe the Charter to avoid a conflict with the Sunshine Ordinance, and *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048 is to the contrary. (*See* Reply at 9-10.)

Nor can the Court rewrite the Charter, in the manner Grossman suggests, to limit the City’s assertion of the attorney-client privilege to situations in which the City can prove that the privilege is “fundamentally necessary.” Such an interpretation would require the Court to read language into the Charter limiting the privilege that is nowhere to be found. It also would undermine the Charter’s guarantee of adequate legal advice and representation for San Francisco and its officials. If each time a city official or the City Attorney asserted the privilege, he had to first prove the particular communication was necessary to the functioning of the attorney-client relationship, that would impose an onerous burden and likely require him to reveal much or all of the content of the privileged communication, destroying the confidentiality that the privilege seeks to preserve. Moreover, the courts would become embroiled in endless Sunshine Ordinance litigation claiming that particular communications were

unnecessary to an effective attorney-client relationship. The associated burden and expense would deter City officials from asserting the privilege, discourage candor between the City and its counsel, and ultimately deprive the City of the effective advice and representation that Charter sections 6.100 and 6.102 were intended to provide. (*See* Petition at 22-25.)

Grossman's proffered interpretation also reverses the law governing privilege. Recognizing that to require case-by-case justifications for assertions of privilege would undermine the purposes for the privilege, the Legislature created a presumption that communications are privileged if a party claims they were made in confidence to or from an attorney. It also imposed the burden on the party seeking access – not the party asserting the privilege – to prove otherwise. (Evid. Code § 917(a) and Comment, Assembly Comm. on Judiciary; *Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557).

In short, Grossman's suggested interpretation of the Charter lacks any language in the Charter to support it and defies common sense. Either the Charter incorporates the privilege or it does not. There is no basis for reading it to allow the privilege to be asserted only in particular instances when it is proven "necessary" or critical to the attorney-client relationship.<sup>1</sup>

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<sup>1</sup> Grossman's invocation of Charter section 2.108 does not change this analysis. (*See* Supp. Opp. at 19 n.4.) Section 2.108 requires the Board to "maintain" a Sunshine Ordinance – it does not require that the Ordinance disrupt or dismantle the attorney-client privilege. Grossman similarly argues that Government Code section 6253(e) authorizes the Sunshine Ordinance and its purported invasion of attorney-client privilege. (*See* Supp. Opp. 1-2, 16-17.) But "[i]f the Legislature had intended to restrict a privilege of this importance, it would likely declared that intention unmistakably, rather than leaving it to courts to find the restriction by inference and guesswork . . ." (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 207.) Nothing in section 6253(e) purports to abrogate the attorney-client privilege, and no court has found otherwise.

4. **Confidentiality is important for communications regarding campaign finance, ethics, and open government laws.**

Grossman blithely states that there is no reason to believe that the disclosure of the records at issue here would interfere with the City Attorney's role. (*See* Supp. Opp. at 32-33.) This argument is a red herring because, as set forth above, there is no basis for parsing between particular documents or categories of documents in determining whether the privilege exists; under the Charter, the privilege applies to all confidential attorney-client communications.

But even if that were not the law, and some showing of necessity were required before the Charter could override an ordinance purporting to carve out certain communications from the privilege, Grossman is factually wrong in arguing that there is no necessity for the categories purportedly excepted in the Sunshine Ordinance: “[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act,<sup>2</sup> any San Francisco Governmental Ethics Code, or this Ordinance.” (S.F. Admin. Code § 67.24(b)(1)(iii).)

This very case demonstrates the point, since the City Attorney's advice to the Ethics Commission about the legal risks relating to its regulations could provide a roadmap to Grossman, who presents a known

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<sup>2</sup> The Political Reform Act, Cal. Gov. Code §§ 81000 et seq., addresses conflicts of interest in government decision-making, disclosures regarding government officials' financial interests, and reporting of campaign contributions and expenditures. Needless to say, this law presents many complicated issues and has been the subject of constitutional challenges. The ability to provide and receive confidential advice concerning the Act is critical to both City officials who endeavor to comply with it and to City officials charged with enforcing it.

litigation threat. (See Reply at 4-5, 13-14.) More generally, finding that the privilege did not exist with respect to the City Attorney's communications with the Ethics Commission would threaten that agency's mission to pursue ethics violations. The Charter requires the Ethics Commission to conduct investigations into alleged violations of campaign finance, lobbying, conflicts of interest and governmental ethics laws. (See Real Party in Interest's Request for Judicial Notice in Support of Supplemental Opposition, Exh. 2 at 6-7 [S.F. Charter § C3.699-13(a)].) If Grossman were to prevail here, the City Attorney could not advise the Ethics Commission regarding these investigations without compromising them; the targets of the investigations could employ a Sunshine Ordinance request to obtain access to the City Attorney's advice to the Ethics Commission's staff about the legal strengths and weaknesses of an enforcement matter in the midst of the investigation. The City Attorney's Office could therefore not fully advise and assist the Ethics Commission in its enforcement role.

**5. The Charter confers the privilege on the City and its officials and governs their obligations with respect to disclosure of information.**

Grossman also argues that Charter sections 6.100 and 6.102 have no bearing here because the privilege belongs to the client and not the attorney. (See Supp. Opp. at 26 ["What an attorney is or is not required to do says nothing about his or her client's separate legal obligation to produce information."]) Grossman is wrong. His argument assumes that the Charter sections providing for an elected City Attorney and setting forth the attorney's qualifications and duties are entirely separate and independent of the rights and obligations of the City itself. That makes no sense. The existence of a City Attorney with the duty to advise and represent the City

and its constituent agencies and officials is an important right that sections 6.100 and 6.102 confer on the City, with the ultimate aim of producing a more effective government. The Charter's incorporation of the state law of attorney-client privilege is designed not to create some special benefit for the City Attorney or some duty on him independent of the City. Rather, the privilege is incorporated for the benefit of the City, to provide *it* with the "freedom to confer with its lawyers confidentially in order to obtain adequate advice." (*Roberts*, 5 Cal.4th at 380.) Thus, it is the City that the Charter entitles to assert the privilege, and the City's obligations in regard to confidentiality of attorney-client advice are in no sense "separate" from the Charter provisions creating the attorney-client relationship. The Charter establishes that relationship, and only a Charter amendment could alter it.

The Court should grant the writ and direct the Superior Court to set aside its order granting a writ of mandate and to enter a new order denying Grossman's writ.

Dated: April 1, 2014

DENNIS J. HERRERA  
City Attorney  
THERESE M. STEWART  
Chief Deputy City Attorney  
ANDREW SHEN  
JOSHUA S. WHITE  
Deputy City Attorneys

By: /s/Andrew Shen  
ANDREW SHEN

Attorneys for Petitioners JOHN ST.  
CROIX, in his official capacity as  
Executive Director of the San Francisco  
Ethics Commission and SAN  
FRANCISCO ETHICS COMMISSION

### CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 2,012 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 1, 2014.

DENNIS J. HERRERA  
City Attorney  
THERESE M. STEWART  
Chief Deputy City Attorney  
ANDREW SHEN  
JOSHUA S. WHITE  
Deputy City Attorneys

By: /s/Andrew Shen  
ANDREW SHEN

Attorneys for Petitioners JOHN ST.  
CROIX, in his official capacity as  
Executive Director of the San  
Francisco Ethics Commission and SAN  
FRANCISCO ETHICS  
COMMISSION



# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

BENEDICT Y. HUR  
CHAIRPERSON

PAUL A. RENNE  
VICE-CHAIRPERSON

BRETT ANDREWS  
COMMISSIONER

BEVERLY HAYON  
COMMISSIONER

PETER KEANE  
COMMISSIONER

JOHN ST. CROIX  
EXECUTIVE DIRECTOR

## EXECUTIVE DIRECTOR'S REPORT TO THE SAN FRANCISCO ETHICS COMMISSION For the Special Meeting of June 23, 2014

### 1. Budget/Staffing.

The Mayor's proposed budget was released on June 2, 2014; I appeared before the Board of Supervisors Budget and Finance Committee to represent the Commission on June 16, 2014. Our budget request for FY 2014/15 was for \$4,707,326; the funding in the budget is currently \$4,524,354, a difference of \$182,972. The budget is expected to be finalized in the next several weeks. If the current funding figure for the Ethics Commission remains static, we will continue to have a vacancy in the Enforcement/Investigations Division. Additionally, the increase of \$15,750 in the newly renegotiated Netfile contract was offset by a corresponding decrease in our temporary staff funds.

### 2. Investigation and enforcement program.

As of June 16, 2014, there were 21 pending formal complaints alleging violations within the Ethics Commission's jurisdiction.

Category	# of Complaints
Campaign Finance	15
Conflict of Interest	2
Governmental Ethics	0
Lobbyist Ordinance	0
Campaign Consultant Ordinance	2
Sunshine Ordinance	2
<b>TOTAL</b>	<b>21</b>

### 3. Campaign finance disclosure program.

a. Filing deadline. May 22, 2014 was the filing deadline for the Second Pre-Election statement, which covers the reporting period ending May 17, 2014.

Due to recent changes to the Campaign Finance Reform Ordinance and Ethics Commission regulations, all committees must now file electronic statements and complete electronic signature requirements. Staff has informed treasurers and candidates about the new requirements and has provided detailed instructions. Staff continues to inform and assist committees during this transition.

b. Collection of late filing fees and contribution forfeitures. In fiscal year 2013-2014, as of May 31, 2014, the Commission collected a total of \$13,736 in campaign finance late fees and forfeitures. Outstanding late fees and forfeitures total \$16,359, of which \$13,260 is pending at the Bureau of Delinquent Revenues (BDR).

c. Status of accounts to San Francisco Bureau of Delinquent Revenues (BDR). The following chart provides details on active accounts referred to BDR as of May 31, 2014:

#	Committee/ Filer	ID #	Treasurer or Responsible Officer	Date referral effective	Original amount referred	Last month's balance	Current balance (Changes are in <b>bold</b> )
1	Johnny K. Wang JKW Political Consulting	100716	Johnny K. Wang	4/19/11	\$4,000	\$4,000	\$4,000
2	Coalition to Elect Chris Jackson to Community College Board	1302351	Chris Jackson	6/17/11	\$2,658.90	\$2,658.90	2,658.90
3	Chris Jackson For Community College Board	1347066	Chris Jackson	7/12/13	\$6,600.94	\$6,600.94	\$6,600.94
						<b>TOTAL</b>	<b>\$13,260</b>

#### 4. Revenues report.

For fiscal year 2013-2014, the Commission is budgeted to generate \$100,000 in revenues. As of June 18, 2014, the Commission received \$87,224 as summarized below. The figure represents collection of approximately 87 percent of expected revenues for fiscal year 2013-2014, with about 90 percent of the fiscal year having elapsed.

Revenues received as of June 18, 2014:

Source	Budgeted Amount FY 13-14	Receipts
Lobbyist Fees	\$27,000	\$60,000
Other Ethics General	\$1,000	\$15
Campaign Finance Fines	\$50,000	\$13,736
Campaign Consultant Fees	\$18,000	\$6,000
Lobbyist Fines	\$1,000	\$200
Statements of Economic Interests Fines	\$1,000	\$1,510
Other Ethics Fines	\$1,000	\$4,713
Campaign Consultant Fines	\$1,000	\$1050
Unallocated	\$0	\$0
Total	\$100,000	\$87,224

#### 5. Lobbyist program.

As of June 16, 2014, 102 individual lobbyists were registered with the Commission. Total revenues collected to date for the 2013-2014 fiscal year amount to \$60,200, with \$60,000 in lobbyist registration fees and \$200 in fines. The filing deadline for the next lobbyist disclosure statement is July 15, 2014.

**6. Campaign Consultant program.**

As of June 17, 2014, 22 campaign consultants were registered with the Commission. \$6,000 in registration fees and \$1,050 in fines and have been collected so far during the 2013-2014 fiscal year. The next campaign consultant quarterly report deadline is Monday, September 15, 2014, covering the reporting period from June 1, 2014 through August 31, 2014. Staff will send reminders to all active campaign consultants before the deadline.

**7. Statements of Economic Interests.**

On June 3, 2014, a second set of reminder letters were sent to the sixteen (16) individuals who had not yet filed their Annual Form 700 with the Commission. As of June 17, 2014, the number of non-filers had been reduced to eight (8) individuals. Anyone who has still not filed as of June 30, 2014 be referred to the Fair Political Practices Commission for enforcement in early July, 2014.

**8. Outreach and Education.**

Commission staff hosted representatives from the Fair Political Practices Commission ("FPPC") and the Franchise Tax Board ("FTB") on Thursday, June 5, 2014. FPPC staff, including Enforcement Chief Gary Winuk (talking in photo below), made presentations regarding the intake, investigation and prosecution of campaign finance and conflict of interest complaints, while the FTB staff provided insight regarding their audit procedures for campaign committees.

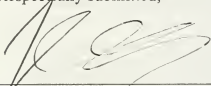


Additionally, the Commission continues to offer trainings on Statements of Incompatible Activities to City departments via web trainings. The following are web video trainings available on the Commission website:

Department of Building Inspection SIA Training  
Candidates' Training

Controller's Office SIA Training  
Department on the Environment SIA Training  
Governmental Ethics Ordinance Training for City Employees  
Lobbyist Ordinance Training  
Medical Examiner's Office SIA Training  
Non-Candidate Recipient Committee Training  
Public Utilities Commission SIA Training  
SIA Template Language Training

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'John St. Croix', written over a horizontal line.

John St. Croix  
Executive Director

Minutes of the Regular Meeting of  
The San Francisco Ethics Commission  
June 23, 2014  
Room 400, City Hall  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102

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**I. Call to order and roll call.**

Chairperson Hur called the meeting to order at 5:32 PM.

COMMISSION MEMBERS PRESENT: Benedict Y. Hur, Chairperson; Paul Renne, Vice-Chairperson; Beverly Hayon, Commissioner. Brett Andrews, Commissioner (absent, excused); Peter Keane, Commissioner (absent, unexcused).

STAFF PRESENT: John St. Croix, Executive Director; Jesse Mainardi, Deputy Executive Director; Garrett Chatfield, Investigator/Legal Analyst.

OFFICE OF THE CITY ATTORNEY: Josh White, Deputy City Attorney (DCA).

OTHERS PRESENT: Patrick Monette-Shaw; Ray Hartz; Allen Grossman; John Nulty; Hope Johnson; Gilbert Chriswell [phonetic]; Michael Nulty; Anita Mayo; and other unidentified members of the public.

**MATERIALS DISTRIBUTED:**

- Staff Memorandum re: Pending Amendments to the City's Lobbyist Ordinance, dated June 18, 2014;
- Order to Show Cause, Court Docket and Appellate Briefs for Grossman v. John St. Croix, Executive Director, and San Francisco Ethics Commission, San Francisco County Superior Court, Case No. CPF-13-513221; California Court of Appeal 1st Dist., Case No. A140308;
- Draft minutes of the Commission's Special Meeting of May 28, 2014;
- Executive Director's Report.

**II. Public comment on matters appearing or not appearing on the agenda that are within the jurisdiction of the Ethics Commission.**

Patrick Monette-Shaw stated that he filed a complaint against David Pilpel with the Clerk of the Board for an alleged Statement of Incompatible Activities violation. He stated that he also copied the Ethics Commission on the complaint. He stated that Mr. Pilpel held himself out as representing the entire Sunshine Ordinance Task Force to the Ethics Commission at its April 2014 meeting.

Ray Hartz stated that several comments made by Ethics Commission members at its May 2014 meeting regarding the Sunshine Ordinance were inappropriate. He stated that the

Executive Director uses his position to manipulate the outcome of hearings. He stated that the public has a right to see documents that are not prohibited from disclosure.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

I request that each member of the Ethics Commission review the recording for its May 28, 2014 meeting. When members of the public raised the issue regarding documents provided to the members of the commission and yet not to the public, some of the comments made by the members of the commission were completely inappropriate! The Sunshine Ordinance, which like it or not this Ethics Commission has an obligation to enforce, requires that such documents be provided to the public. My personal concern about such documents is St. Croix, using his position as Executive Director, to manipulate hearings held before this commission. He determines in advance the desired outcome and then presents "evidence" that will support that outcome and either marginalizes and/or omits "evidence" that will not! The public has a right to see documents that you consider in open or closed session that are not specifically prohibited from disclosure.

Allen Grossman stated that many public records related to agenda item number six were not provided to the Commission. He stated that the matter referenced in that agenda item began in 2012. He stated that there is not a case pending at the court because the only thing left to happen is for the Court of Appeal to issue its decision. He stated that there is no defendant, because the Executive Director and Ethics Commission were named respondents in the superior court action and the Ethics Commission is the petitioner in the appeal. He stated that he is baffled as to what action the Ethics Commission could take regarding this matter at this point.

John Nulty stated that he wanted to request that the Commission direct staff to accept his Statement of Participation or Non-Participation in Public Financing Program Form SFEC-142(a). He stated that the Ethics Commission should have a check-off list for candidates like other departments, and that the Ethics Commission is not functional.

Hope Johnson stated that agenda item six should be heard in open session. She stated that the Sunshine Ordinance does not allow for the attorney-client privilege. She stated that the Sunshine Ordinance Task Force was shut out of the Ethics Commission's deliberations regarding the Ethics Commission's adoption of its regulations to handle Sunshine Ordinance complaints. She stated that the City Attorney cannot assist departments in withholding documents.

Gilbert Chriswell [phonetic] of New District 8 stated that the names of the Ethics Commission members should appear on the agenda. He stated that he ran for elective office in 2000 and he did not receive public financing. He stated that he has heard of candidates having problems knowing when to report for public financing. He stated that in 2000 the Ethics Commission had a calendar of dates to assist candidates.

Michael Nulty stated that he filed as a candidate and set up an online filing account. He stated that he attempted to file his Statement of Participation or Non-Participation in Public Financing Program SFEC-142(a) with the Ethics Commission on June 13, June 17, and June 19, and was told each time that he could not file that form. He stated that Ethics Commission staff told him that the form could not be accepted after June 10. He stated that Ethics Commission staff failed to tell him what procedures to take. He stated that the form was not handed to him with the rest of the documents that he received when he initially filed.

**III. Discussion regarding legislation passed by the Board of Supervisors on June 17, 2014, which amends the City's Lobbyist Ordinance to, among other things: (1) change the lobbyist qualification threshold; (2) increase the number of City officials covered by the ordinance; (3) modify certain exemptions from the lobbyist registration requirement; (4) impose certain Commission mandates; (5) add new enforcement provisions; and (6) require reporting by certain permit expeditors and developers.**

Deputy Executive Director Mainardi introduced the item and highlighted that the most significant change to the Lobbyist Ordinance was to the registration threshold, and the addition of permit expeditors.

Vice-Chairperson Renne asked how the Commission will reach out to educate the public on the changes to the Lobbyist Ordinance. Deputy Director Mainardi responded stating that the Commission will update its information online, and to the lobbyist manual.

Vice-Chairperson Renne asked if the changes would require that any individual member of the public who reaches out to a City official will now be considered a lobbyist. Deputy Director Mainardi responded stating that there is still a monetary threshold to register as a lobbyist and that the changes reduce that amount to compensation of one penny.

Responding to a question from Chairperson Hur, Deputy Director Mainardi responded stating that the changes will likely cause an increase in the number of registered lobbyists which will take additional resources to administer. He continued stating that the addition of a new disclosure category of permit expeditor will also increase costs to put those forms online, along with increased costs to the Commission to perform the now mandatory audits of reported lobbyist activity.

Chairperson Hur stated that the new law only requires one audit per year, but that he would like the Commission to perform more than that each year.

Public Comment:

Ray Hartz stated that the conversation he just heard is disturbing. He stated that the Ethics Commission is treating these changes as a "fait accompli" imposed by the Board of Supervisors. He stated that the Ethics Commission has an obligation to review these changes, and that he will be carefully following the implementation of this law. He stated that with the new threshold

contact requirement, a lobbyist could contact City officials 48 times a year without triggering the registration requirement. He stated that the exemption for non-profits is inexcusable, and that the Commission should perform at least 20 audits a year. He stated that this is just "Chiu" legislation to hide how many times he meets with lobbyists.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

I will be following very carefully the discussion regarding this agenda item and any subsequent action that might be recommended or taken. In section 1, as long as contacts with elected officials are through an in-house "lobbyist," contacts can exceed 50 48 per year without triggering the threshold. In section 3, adding an exemption for "nonprofit organizations," is wholly unacceptable! Such groups receive many millions of dollars per year as a result of their contacts with city officials. Such contacts must remain subject to public scrutiny. In section 4, "random audits of at least one lobbyist per year," is nothing but a joke! "The Chiu legislation" is nothing but an effort by David Chiu to hide some of the 597 contacts with lobbyists documented by Supervisor Campos campaign. The BOS will pass these amendments to hide the overwhelming impact lobbyists have on our city officials, particularly members of the BOS.

Patrick Monette-Shaw stated that the Ethics Commission has an ethical imperative, but has problems with doing that. He stated that the one audit requirement is ridiculous. He stated that private citizens should not be considered lobbyists. He stated that the Ethics Commission should urge the Mayor to send this legislation back to the Board of Supervisors to make it clear that this law will not apply to private citizens.

Anita Mayo stated that the Commission should reach out to lobbyists and developers regarding the changes, particularly because the new law imposes joint liability on the lobbyist and employer.

#### **IV. Discussion and possible action regarding proposed stipulation, decision and order in connection with a complaint initiated or received by the Ethics Commission. Closed Session.**

Executive Director St. Croix stated that the Commission will take separate public comment and vote on each of agenda items four, five, and six, and then hold one closed session. DCA White stated that is permissible.

#### Public Comment:

Ray Hartz stated that under the Sunshine Ordinance, agenda items must be sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item so that he or she would know to attend. He stated that the agenda item description for this item fails to do that. He stated that the Ethics Commission should hold this item in open session. He stated that the Ethics Commission could be discussing something about him in closed session, and he would not know.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

Sunshine Ordinance section 67.7(b) reads as follows: "A description is meaningful if it is sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item." How would anyone know if their interests are affected by this description? It says nothing more than a discussion of "anticipated litigation." Telling the public some information, such as the specific case to be discussed, would not in any way breach confidentiality or compromise attorney-client privilege. It would, on the other hand, alert a person whose interests are affected by the item, which is a requirement of the law. I sincerely hope this commission will not attempt to dismiss out of hand the public's very real concern that matters be considered in full view of the public.

Patrick Monette-Shaw stated that the descriptions for agenda items four, five, and six should be broader. He stated that the Commission could list the type of case to be discussed in closed session in the description.

Allen Grossman stated that the agenda item description is not in compliance with the Brown Act. He stated that the Commission has the burden to demonstrate that disclosing the name of the case to be discussed would prejudice the outcome.

DCA White advised the Commission that under the City Charter, agenda items four and five must be conducted in closed session. He stated the Commission has the discretion to discuss item six in open session if it so chooses, but that item six is indeed pending litigation.

Vice-Chairperson Renne stated that the Ethics Commission has informed each respondent in a complaint of the matter. He stated that to protect a respondent's right to privacy, the Commission must determine if there is probable cause to believe a violation of law occurred in closed session. He stated that if the Commission determines that there is probable cause to believe a violation of law occurred, the Commission makes that announcement in open session immediately following the closed session.

**Motion 14-06-23-01 (Renne/Hayon) Moved, seconded and passed (3-0, Andrews absent, excused; Keane absent, unexcused) that the Ethics Commission go into closed session for agenda item four.**

- V. Discussion and possible action regarding probable cause determinations in connection with complaints received or initiated by the Ethics Commission. Closed Session.**

Public Comment:

Ray Hartz stated that Commissioner Renne did not tell the truth that all parties involved in a hearing are noticed and aware of the hearing date. He stated that the Ethics Commission scheduled a hearing that he was a party to while he was out of town and he did not receive notice until he returned, which was after the hearing date. He stated that for this agenda item, three cases will be discussed that no one knows anything about. He stated no documents were provided to the public, so legally the Commissioners should not have received any documents.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

Here we have the same issue, only in triplicate! We have three cases about which no one has any idea, apparently including the members of this commission, regarding what cases will be discussed. Of course, I'm assuming that since no documents whatsoever were provided for the public, that the commissioners received nothing in advance. What the public is asked to believe is: you're going to discuss three cases without any advance consideration or preparation. Don't know what the cases are, don't know the scope of the discussion, damn, don't have any idea at all! If that is the case, you actually can have no idea whether to go into closed session or not. If you don't know what you're going to discuss how can you rationally decide that a closed session is required? Sunshine ordinance [sic] section 67.8 states that the agenda disclosure shall "specifically identify a case under discussion."

Patrick Monette-Shaw stated that at the last Commission meeting, DCA White told Commissioner Keane that because documents were not provided for the public, the Grossman discussion needed to be postponed. He stated that this agenda item also violates the Brown Act and he requested that DCA White comment on whether the Commission can hear this item.

Allen Grossman stated that the description for this agenda item is confusing. He stated the public cannot ascertain what will be discussed. He stated that the Brown Act requires that an agency name the litigation unless doing so will jeopardize the agency's ability to conclude existing settlement negotiations.

**Motion 14-06-23-02 (Renne/Hayon) Moved, seconded and passed (3-0, Andrews absent, excused; Keane absent, unexcused) that the Ethics Commission go into closed session for agenda item five.**

- VI. Discussion regarding the status and background of pending litigation as defendant, *Grossman v. John St. Croix, Executive Director, and San Francisco Ethics Commission*, San Francisco County Superior Court, Case No. CPF-13-513221; California Court of Appeal 1st Dist., Case No. A140308. Partial Closed Session.**

Public Comment:

Ray Hartz stated that he had been waiting with anticipation on whether or not the Ethics Commission will go into closed session for this item. He stated that he predicts that

Commissioners Hur, Renne, and Hayon will vote to go into closed session and that Commissioners Keane and Andrews will vote to hold the discussion in open session. He stated that Executive Director St. Croix hides as much as possible. He stated that many people do not attend these meetings because they know the Ethics Commission is a bunch of politicians.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

I've been waiting with keen anticipation for the result of the discussion whether to handle this agenda item in "full view of the public." Hell, I'm curious as to whether you let the public have any opportunity to observe your discussion? I'm going to go out on the limb: Hur, Rennie [sic] and Hayon will vote to hide and Keane and Andrews will vote to let the Sunshine in. I win either way! Either I'm right and you choose to hide or I'm wrong and you choose to be open. I doubt I will be, but, I sincerely hope I'm wrong! John St. Croix's pattern of hiding as much as possible is getting truly tiring: not placing items properly on the agenda, not providing supporting documents, etc. etc. etc. I believe the members of this Ethics Commission need to give the Executive Director clear instructions to be as open as possible.

Patrick Monette-Shaw stated that the memory of the Ethics Commission has slipped. He stated that the Ethics Commission is not the defendant in this case. He stated that in the last meeting Commissioner Keane wanted to ignore the advice of DCA White which was to postpone the item. He stated that this item is not really pending litigation.

Allen Grossman stated that following the last meeting, he made a records request to the Commission for the documents that were provided to the Commission members, and that one of the records was withheld citing the attorney-client privilege. He stated that even if the Ethics Commission prevails at the appellate level, this case is going to the Supreme Court. He stated that the Ethics Commission bylaws require that it comply with the Sunshine Ordinance.

Hope Johnson stated that the Commission should discuss this item in open session. She stated that for four years the Commission issued memoranda that stated Sunshine Ordinance Task Force referrals were not valid. She stated that the Sunshine Ordinance was approved by the voters and that City departments belong to the people, so records are presumed to be public.

Chairperson Hur stated that the Commission could hold an open session discussion to get an update on the litigation and then go into closed session to obtain legal advice.

Vice-Chairperson Renne proposed waiving the attorney-client privilege and discussing the entire matter in open session.

Commissioner Hayon stated that she would be fine with an open session discussion to get an update on the litigation, but is not willing to waive the attorney client privilege.

**Motion 14-06-23-03 (Hayon/Renne) Moved, seconded and passed (3-0, Andrews absent, excused; Keane absent, unexcused) that the Ethics Commission receive a status update on item six in open session then go into closed session for agenda item six to receive attorney advice.**

Executive Director St. Croix gave a brief outline of the litigation to date. He also stated that Commissioner Keane requested a discussion on the matter related to the appeal and that was why the Commission was only provided with the appellate documents.

Responding to Chairperson Hur, DCA White stated that the superior court judge did not review the withheld documents. He stated that both parties agreed that the central issue was the applicability of the Sunshine Ordinance provision that removes the attorney-client privilege for any communication to City departments concerning the California Public Records Act, the Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or the Sunshine Ordinance.

Commissioner Renne stated that in relation to this item, all documents were provided to the public with the exception of a memorandum to the Commission from the City Attorney.

Public Comment:

Ray Hartz stated that the Ethics Commission is a “piece of work.” He stated that this discussion did not provide the public any insight into this matter. He stated that the Commission will now just go into closed session to have the real discussion.

Patrick Monette-Shaw stated that he read every brief filed in the court case, and that he was appalled by each brief written by the City Attorney. He stated that the analysis of the City Attorney was nothing more than “fairy dust.” He stated that Mr. Grossman’s lawyer shredded DCA Shen’s garbage. He stated that there is no provision in the City Charter that protects the attorney-client privilege.

Allen Grossman stated that he was baffled about what would be discussed in closed session. He stated that the Ethics Commission cannot assert the attorney-client privilege, and that the Brown Act requires that he be given all documents related to this agenda item.

Hope Johnson stated that the Sunshine Ordinance provision at issue does not allow for the attorney-client privilege to be asserted, and that any advice by the City Attorney regarding the Sunshine Ordinance cannot be privileged.

Commissioner Hur stated to Ms. Johnson that the purpose for closed session on item six was to discuss litigation.

The Commission went into closed session for items four, five, and six at 7:00 PM. All members of the public left the hearing room. Chairperson Hur, Vice-Chairperson Renne, Commissioner Hayon, Executive Director St. Croix, Deputy Executive Director Mainardi, Ethics Commission staff member Garrett Chatfield, and DCA White all remained in the hearing room during closed session.

The Ethics Commission came out of closed session at 7:55 PM. Ray Hartz returned to the hearing room.

Executive Director St. Croix read an announcement related to agenda item four. He announced that during closed session the Commission approved a Stipulation, Decision and Order and a penalty of \$9,000 with respect to Ethics Complaint No. 12-130819.

Executive Director St. Croix read the following three announcements related to agenda item five:

Executive Director St. Croix announced that during closed session the Commission found probable cause to believe that Bob Squeri, a former candidate and the treasurer of the Bob Squeri for District 7 Supervisor 2012 committee, committed two violations of the San Francisco Campaign Finance Reform Ordinance by failing to include a disclosure statement in the required font size on campaign advertisements.

Executive Director St. Croix announced that during closed session the Commission found probable cause to believe that Melissa Apuya, a former candidate and the treasurer of the Melissa A. Apuya for Democratic Central Committee, 13th District committee, committed five violations of the San Francisco Campaign Finance Reform Ordinance by failing to file campaign statements.

Executive Director St. Croix announced that during closed session the Commission found probable cause to believe that Wendy Aragon, a former candidate and the treasurer of Committee to Elect Wendy Aragon to Democratic County Central Committee, committed two violations of the San Francisco Campaign Finance Reform Ordinance by failing to file campaign statements.

Chairperson Hur stated that prior to the Commission moving into closed session, Hope Johnson still had approximately one minute of public comment time. He stated that Deputy Executive Director Mainardi asked her if she wanted to return to the hearing room to complete her public comment, and she declined. Chairperson Hur apologized to Hope Johnson and stated that it was rude of him to interrupt her comment.

**Motion 14-06-23-04 (Hayon/Renne) Moved, seconded and passed (3-0, Andrews absent, excused; Keane absent, unexcused) that the Ethics Commission not disclose attorney advice it received during closed session for agenda item six.**

Public Comment:

Ray Hartz stated that the agenda could have at least included what the violations of law were without compromising any confidentiality.

**VII. Discussion and possible action on the minutes of the Commission's meeting of May 28, 2014.**

No discussion.

Public Comment:

Ray Hartz stated that the minutes for the May meeting are an example of why he wanted 150 word statements included in the minutes. He stated that the public comment is summarized to the point of being meaningless. He stated that public comment is constitutionally protected free speech. He stated that the Ethics Commission just dismisses public comment and there is no attempt to put into the record what was actually said.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

These minutes are perfect example is why I have fought so hard for the right to include 150 word summaries in the minutes! Using a number of rationalizations, the minutes are pared down to nothing, particularly as relates to the comments made by the public. In fact, these minutes are nothing but de facto censorship of public participation! If anyone hearing these comments believes I'm off base, I'd simply asked that they come here, speak for three minutes, and then read the summary in the appropriate minutes. See for yourself whether there is anything that you said which is represented in a meaningful fashion. And I'll say it one more time: we are talking about constitutionally protected political free speech! The protection of that free speech extends to its representation in the public record! This is particularly true when the free speech equates to "a petition for redress of grievances!" [sic all]

**Motion 14-06-23-05 (Hayon/Hur) Moved, seconded and passed (3-0, Andrews absent, excused; Keane absent, unexcused) that the Ethics Commission approve the minutes for the special meeting of May 28, 2014.**

### **VIII. Discussion of Executive Director's Report**

Executive Director St. Croix stated that he asked the Controller's Office for assistance with completing audits of campaign committees. He stated with that help, the Commission will be caught up with all audits by the end of the year. He stated that the California Fair Political Practices Commission held a training for staff. He stated that due to increased compliance, revenues are slightly down.

Public Comment:

Ray Hartz stated that the Executive Director's report is always the same generic form. He stated that from now on, he will select one item to discuss each month. He stated that Luis Herrera perjured himself on his Statement of Economic Interests for years. He stated that Luis Herrera abused his position and it took members of the public to expose the wrongdoing.

*The following written summary was provided by the speaker, Ray Hartz, the content of which is neither generated by, nor subject to approval or verification of accuracy by, the Ethics Commission:*

This report is always a generic, one-size-fits all, check the box, evolution! To make these discussions more meaningful, each month I'm going to select one specific item to discuss. Today its item 7, on Statements of Economic Interests. For years, City Librarian Luis Herrera accepted thousands of dollars of reportable "gifts" from The Friends. He did so while ignoring his fiduciary responsibility to provide oversight for the millions of dollars raised and expended each year by that group. And, year after year, he perjured himself in denying the receipt of those "gifts!" In a quid pro quo arrangement he accepted the gifts, lied about accepting them, and looked the other way. He also abused his position as a City Department Head to withhold public records which would uncover this illegal activity in violation of both the Brown act [sic] and the Sunshine Ordinance. Members of the public had to do your job!

#### **IX. Items for future meetings.**

Vice-Chairperson Renne stated that agenda items for closed session should identify the violation so the public can be better informed as to the nature of any closed session discussion regarding complaints. Commissioner Hayon agreed.

Commissioner Hayon stated that she would like the Executive Director to look into whether or not the assertions by John Nulty and Michael Nulty receiving incorrect information from staff was true. She stated that all staff should know the correct information regarding filing deadlines and other campaign rules and candidate obligations.

#### Public Comment:

Ray Hartz stated that the Commission should reopen the Sunshine Ordinance referral that he had against Luis Herrera. He stated the Commission made no effort to determine why he did not attend the hearing. He stated that he was out of state and did not receive notice of the hearing until he returned. He stated Luis Herrera lied to the Commission. He stated there would be no cost to the Library Commission to allow him to use the overhead projector, as the Library Commission allows the groups they like to make overhead presentations and that is viewpoint discrimination. He stated that he was denied due process and is angry at the way the Commission handled the hearing.

#### **X. Adjournment.**

**Motion 14-06-23-06 (Hayon/Renne) Moved, seconded and passed (3-0, Andrews absent, excused; Keane absent, unexcused) that the Ethics Commission adjourn.**

The Ethics Commission adjourned the meeting at 8:20 PM.









